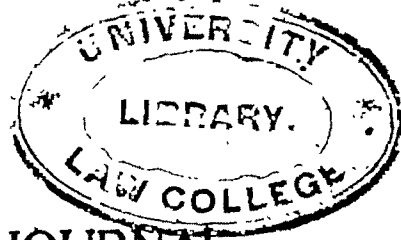


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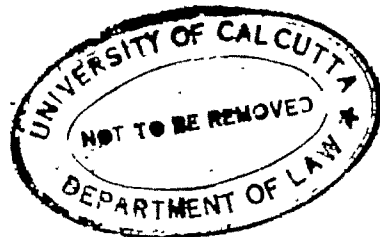
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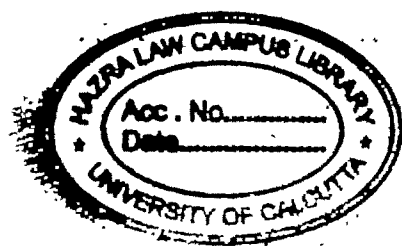


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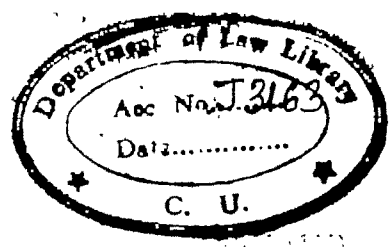
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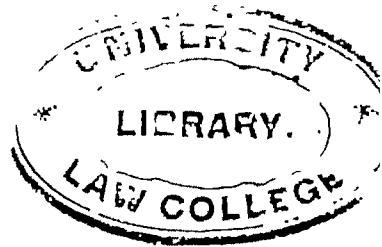


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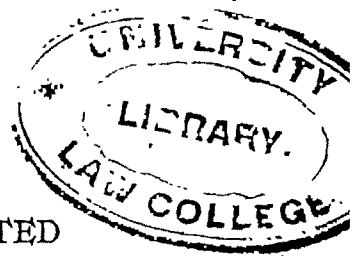


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The Calcutta Law Journal.

Reports.

—:O:—

CRIMINAL REFERENCE.

*Before Sir George Claus Rankin, Knight, Chief Justice and
Sir Philip L. Buckland, Knight, Judge.*

EMPEROR

v.

DEBENDRA NARAIN CHAKRABARTY*

CRIMINAL.

1929.

January, 14.

Jury, verdict of—Reference—Criminal Procedure Code (Act V of 1898), Sec. 307—Culpable homicide—Medical evidence and post mortem report inconsistent with the prosecution story of murder—Deposition of the medical officer before the committing Magistrate tendered in evidence in the recorded form before the jury—Medical Officer not called before the jury—Unpardonable carelessness on the part of the prosecutor—Miscarriage of justice—Verdict of acquittal justified—Time of death—Opinion of medical officer after post mortem examination to be recorded at the earliest opportunity.

The accused was tried upon a charge that he on the 14th April 1928 committed culpable homicide by killing his wife by an instrument. The defence was that while the wife was cooking in the kitchen a part of the wall fell upon her and she died at a time when he was absent but which he discovered after returning home. The medical evidence was equally inconsistent with the view that the wall fell down upon the wife and killed her as with the view that she was beaten to death with any instrument by the accused. It further says that the death might have taken place 3 days before the post-mortem examination, which was held the next day after the alleged date of occurrence. The only thing done was that the deposition of the medical officer, who held the post-mortem examination, was put in before the committing Magistrate as part of the evidence but the medical officer was not called and examined before the jury :

Held, that in a case of this type where everything depended upon the medical evidence and upon the jury being able to satisfy themselves as to what the medical facts really were, the prosecution had no right to stand merely

* Jury Reference No. 51 of 1928 by S. K. Sinha Esq., Sessions Judge of Murshidabad, dated the 4th September, 1928.

CRIMINAL

1929.

Emperor

Debendra Narain
Chakrabarty.

upon the deposition in its recorded form; that it was gross carelessness on the part of the prosecution not to call the medical officer himself or to give any medical evidence in the hearing of the jury, when the statement given as a medical opinion by the Doctor who held the post-mortem was utterly inconsistent with the prosecution evidence.

Held, further that in serious cases of murder or of manslaughter the jury cannot convict the accused unless a proper exposition and explanation of the medical evidence is given *vis-à-vis* by a Doctor who can deal with the matter and satisfy the jury. The jury are quite entitled to be fully satisfied.

Held also, that under the circumstances of the case the jury was entirely right in acquitting the accused; that it was not necessary to hold further enquiry into the matter.

Held (per Buckland, J) The medical officer who makes the post-mortem examination should record at the foot of the post-mortem report form the length of time which in his opinion has elapsed since death took place.

Reference under section 307 of the Code of Criminal Procedure.

The material facts appear from the judgment of the learned Chief Justice.

Messrs. Mrityunjay Chatterjee and Manindra Nath Banerjee for the Accused.

Mr. Khundkar (Deputy Legal Remembrancer) for the Crown.

The following judgments were delivered:

Rankin, C. J.—In this case the accused man was put on his trial before the learned Sessions Judge of Murshidabad and a Jury of five upon a charge that about midday on the 14th April 1928 he committed culpable homicide by killing his wife. The wife's name was Kiranbala and it would appear that she was a mere girl of some 15 years of age. She had been married to the accused since about 1924.

Now the evidence on the part of prosecution consists first of all of a considerable amount of evidence to the effect that the accused used from time to time to ill-treat his wife. There is a certain amount of evidence but not of a character which can be said to be in any way substantial to the effect that the accused man was carrying on an intrigue with the widow of an uncle who lived next door and that this might have had something to do with the animosity between the husband and the wife. There is some further evidence—as to which it is a matter of opinion whether it is substantial or not—to the effect that this girl may have been acting imprudently if not carrying on an intrigue with the witness Srikrishna. But the evidence which

January, 14.

matters and which may be regarded as the evidence upon which the prosecution sought to bring the charge home to the accused is, in the first place, the evidence of some 4 or 5 witnesses who say that in the middle of the day on the 14th April as they passed near by to the accused's hut they heard his wife crying out for help saying that she was about to be killed, and one witness at least speaks to words of threat and intention to kill on the part of the accused man. Sometime afterwards it appears that the accused is seen by certain witnesses going on to the top of his kitchen with an instrument—what has been called a crowbar—and breaking down a part of the wall. When the accused man makes up his mind to call in persons from outside the body of the wife is discovered lying on the floor with certain parts of the earthen wall lying round about her and certain parts lying on her body, and the story that is given out by the husband is this that he was away from the house in the morning but that when he came back in the afternoon he found this state of affairs, and his suggestion was that he knew nothing as to what occurred and that it would appear that a part of this wall had fallen down upon the girl and she had met her death while cooking in that room. It would appear further that a few days before the occurrence a fire in the thatch of this house had taken place and it is suggested that the damage done at that time may have accounted for the collapse of this earthen wall.

The condition of the body of the girl and the clods make it extremely difficult to suppose that any such accident happened as that the wall collapsed on the top of the girl and killed her. It appears that only a small portion of the wall collapsed at all. In addition to that there is the evidence of witnesses who say that the man was seen breaking down a part of the wall with a crowbar. One clod at least was produced in Court and the learned Judge was satisfied that it showed marks that it had been forced off by a crowbar. If, therefore, the question in this case was—whether or not the accused man had shown that this girl had met her death by the wall falling on the top of her—there would be very little doubt of the finding which is against him.

The real question which arises is whether in these circumstances this Court can rely upon the evidence which tends to show that the girl met her death at the hands of the man,—that the man was in the hut with her in the middle of the day and

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was ill-treating her in such a way that she came by her death.

As I have said, there is evidence, of 4 or 5 witnesses called to say that they heard the screams and called to say that the man himself was heard to shout. One witness indeed says that he stepped up and peeped in and saw what was happening and that the man threatened him with this instrument or crowbar.

I confess that on reading the evidence of these witnesses for the first time I rather thought that these witnesses were intending to say that they heard sounds of the man beating his wife or sounds that pointed to this. On re-reading their evidence I find that it is not clear that they go so far. They all speak merely to hearing something being cried out or said.

The question is one which requires to be carefully examined in the light of the Injury Report and of medical evidence. The first thing that one sees from the medical evidence is that it would appear to be equally inconsistent with the view that the wall fell down upon the girl and killed her as with the view that she was beaten to death with any instrument. There is one abrasion below the right angle of the lower jaw. There is another about an inch below the right side of the neck of the dimension of a pice. There are some indications that the girl died from asphyxia and so far as can be seen if this girl met her death she probably died from being suffocated. The back of her legs and other portions of her body and a small portion of the throat are described by the expression "skin removed", but no indication is given of the probable character of the agency by which it was done. The opinion of the Doctor is that there was probably an unnatural death and the medical officer who conducted the post-mortem said that all the signs pointed to asphyxical death.

If that were all it would be a somewhat formidable case to leave to the jury against the accused on the basis that the shouts and cries that had been heard at that time were shouts and cries by the man at a time when the man was either strangling her by pressing her throat or otherwise endeavouring to choke her. But most unfortunately and by what appears to be the greatest imprudence no Doctor was called before the jury at all. The only thing that was done to satisfy the jury in this case—a case where everything depends upon the medical evidence and upon the jury being able to satisfy themselves as to what the medical facts really were—was that the medical officer Srish Chunder Sarkar was called before

the committing Magistrate and his deposition was put in as part of the evidence for the prosecution at the trial. When that comes to be examined one finds that the Doctor is recorded to have given the opinion that death might have taken place not less than three days before the date of the post-mortem examination. He does definitely say taking that sentence at its ordinary meaning that in his opinion death could not have been less than three days before the date of the post-mortem examination. Whether that is what he said and, if so, whether that is what he meant is another matter. But at the time this trial was held before the learned Sessions Judge and a jury the prosecution had no right to stand merely upon that deposition in its recorded form and it seems to me to be unpardonable carelessness in a case of this character that with a statement utterly inconsistent with the prosecution evidence given as a medical opinion by the Doctor who held the post-mortem no endeavour was made either to call the medical officer himself or to give any medical evidence in the hearing of the jury.

When one comes to look in detail at the report of the post-mortem one finds that the post-mortem was conducted on the very next day after the alleged occurrence. The girl is said to have been lying dead on the midday of the 14th April. The Doctor who held the post-mortem on the 15th says or appears to say that he thinks that she must have been dead for at least three days. When one examines the Injury Report one sees that a great many of the organs specified in the usual form are described one after another as "decomposed," and one would presume that what is meant is that these organs are in such a condition that no useful information can be gathered by inspection and one certainly would think from the post-mortem report that there was ample material for the opinion that the girl must on the 15th have been dead for three days. If that be so, then the evidence of the Doctor given before the jury was absolutely inconsistent with the witnesses' story as to what they heard on the 15th and the case is left to the jury as appears from the learned judge's heads of charge without any comment being made upon that circumstance; nor does the learned Judge give it a place in this letter of Reference. The charge of the learned Judge and the letter of Reference are both lucid and admirable and I have nothing to say against them—excepting this that they in no way say that there is any difficulty arising out of the evidence of the Doctor.

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In these circumstances we have to regard the verdict of the jury in a manner which is quite different from the way in which we might feel ourselves obliged to regard a verdict which has no basis or justification in the recorded evidence. The jury were if this was a point present to their minds quite right to say that they could not be asked to convict the accused man with evidence in that condition. They were entitled to say to themselves "Suppose the doctor had been called, suppose he came before us and it had been put to Dr. Sris Chunder Sircar that this girl was alive on the 14th April and suppose he had said 'Well, in my opinion, from what I saw on the 15th I say that is quite impossible,' no jury could have convicted upon the evidence in this case. It seems to me that that is exactly the position in which this Court now is upon this Reference.

It is true that we have power under section 307 Criminal Procedure Code read with section 428 to call further evidence. It would perhaps be possible to have Dr. Sris recalled and the whole matter gone into again. Then the case would come back before this Court after a perfectly proper acquittal by the unanimous verdict of the jury who tried the case. It would come back before this Court on a different state of the evidence and in that case we should have no doubt power to do what we think right. Speaking for myself I am entirely unable to accede to the suggestion that further evidence on this matter should be called.

I wish that it could be impressed upon Public Prosecutors and upon the Sessions Judges that in cases—serious cases of murder or of manslaughter—it is unreasonable to expect the jury to convict if a proper exposition and explanation of the medical evidence is not given *via voce* by a Doctor who can deal with the matter and satisfy the jury. The jury are quite entitled to be fully satisfied. Indeed not until one has gleaned all the facts one can from the medical report is one really in a position to say what parts of the other evidence can be relied upon. In my opinion it may or may not be a mere mistake in expression of opinion or that that the Doctor was mistaken or was misinterpreted, but it is impossible for us to do anything save to take this solemn opinion as it is. I do not know, as this is not the first time on which I have had occasion to make this criticism or complaint, whether this will have any effect upon the conduct of cases of this character in the future, but the one circumstance which seems to me to make this case worthy of attention is that it is a very plain

illustration of the fact that a jury will sometimes find points which are really against prosecution but which escape the notice of learned Judges and of Public Prosecutors.

Thinking as I do that in this case the jury were entirely in the right, in my opinion, this Reference ought to be rejected and the accused acquitted and if he is in custody, he must be released.

If he is on bail his bail bond should be discharged.

Buckland, J :—I agree but I desire to make a few observations as to what has been disclosed at the hearing of this Reference.

To me it is shocking that what may be a serious miscarriage of justice should occur by reason of what the learned Chief Justice has described, and I entirely concur, as unpardonable carelessness on the part of those charged with the prosecution. Ordinarily it is the practice to call the Doctor as a witness in the Sessions Court when the death of a person is involved. That being so I do not understand why it was not followed on this occasion for the Public Prosecutor must have been fully aware of what the doctor had said. Similarly with regard to the Sessions Judge, who could under section 509 (2) Criminal Procedure Code have required the Doctor to be summoned and examined as a witness and I am wholly at a loss to understand why he did not insist upon the Doctor being called.

We were asked to send the case back to the Sessions Judge to have the Doctor further examined or to examine him ourselves. The question as to how long before the post-mortem examination the death had actually occurred is, as regards the Doctor, a matter of opinion. The facts upon which the Doctor formed his opinion must have been fresher and far more readily present to his mind at the time when he gave his evidence in the Magistrate's Court than they possibly could be now. If he were to repeat his former opinion, time and expense would have been wasted. If, on the other hand, he were to give an opinion more favourable to the prosecution it could not fail to be subjected on behalf of the accused to strong adverse comment. In the circumstances I do not think it would be fair to the Doctor to send the case back for or to take further evidence and it is extremely doubtful if it would serve any useful purpose.

Finally I desire to make one observation with regard to the post-mortem report. I observe that that it is chiefly confined to facts observed by the Doctor but there is, however, a place at the

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foot where the medical officer is required to record his opinion as to the cause of death. Though my experience of cases of this kind is limited it appears to me that it probably would be useful that he should also be required to record the length of time which in his opinion has elapsed since death took place. This is a matter as to which I apprehend that in every case the medical man who conducts the post-mortem examination should be able to express an opinion, either with or without qualification. It would be preferable that he should be required to record his opinion at the earliest possible moment than that he should be asked to give it at a later stage when he has not the same opportunity to observe the facts upon which he must form his conclusion.

D. K. R.

Reference rejected : Accused acquitted.

APPELLATE CIVIL

*Before Mr. Justice Jack and Mr. Justice D. N. Mitter.*THE PORT CANNING AND LAND IMPROVEMENT
COMPANY, LIMITED

v.

ASIRADDI MOLLAH AND OTHERS.*

CIVIL,

1929.

February, 4, 5.

Bengal Tenancy Act (VIII of 1885) Secs. 43, 46—Non-occupancy raiyat—Decree of Court determining fair and equitable rent—Agreement to pay enhanced rent pending appeal—Dismissal of the appeal—Liability to pay enhanced rent, when accrues.

The liability of a non-occupancy raiyat to pay enhanced rent is not dependent on the decree of the Court which merely stops short after determining what the fair and equitable rent is. His liability really attaches from the date when the tenant agrees to pay the rent so determined within the meaning of section 46 cl (7) of the Bengal Tenancy Act: *Mussamat Bibi Wasikunnissa Begum v. Babulal Mahtan* (1).

Appeal by the Plaintiff.

Suit for rent.

The material facts will appear from the judgment of Mitter J.

*Appeal from Appellate Decree No. 239 of 1927, against the decree of N. G. A. Edgley Esq., District Judge of 24-Pergannas, dated the 19th August, 1926, affirming the decree of Babu Nalini Mohun Banerjee, Subordinate Judge, 3rd Court of that place, dated the 14th February, 1925.

(1) (1925) L. L. R. 5 Pat. 46.

Dy. Sarat Chandra Basak with Messrs. Khetra Mohan Ghosh, Birendra Kumar De, Rama Prosad Mookerjee and Durgadas Roy for the Appellants.

Messrs. Sisir Kumar Ghoshal and Gurudas Mukerji for the Respondents.

The judgments of the Court were as follows :

Mitter, J.—This is an appeal by the plaintiffs—the Port Canning and Land Improvement Company Ltd. in a suit instituted by them against the defendants for arrears of rent for the year 1319 to 1330 B. S. It appears that the plaintiff Company served upon the defendants who were non-occupancy raiyats an agreement demanding a certain enhanced rent. The defendants did not agree to the enhancement. The plaintiffs consequently had to institute against the defendants proceedings under section 46 of the Bengal Tenancy Act so far back as the 28th March 1913. The Court of first instance which tried the suit dismissed the plaintiffs' claim. On appeal, the lower appellate Court affirmed the decision of the Court of first instance. The matter was then carried in second appeal to the High Court and the High Court remanded the suit on the 24th July 1919 for determining what the fair and equitable rent in respect of the holding would be. On the 28th September 1921, the Munsiff determined the fair and equitable rent in respect of the lands in question. Against this decision, the tenants preferred an appeal to the District Judge. During the pendency of the appeal, on the 5th November 1921, the tenants agreed to pay the enhanced rent as settled by the Munsiff subject to the result of the appeal. On the 6th July 1923, the appeal of the tenants was dismissed. The present suit was instituted on the 14th April 1924. The Court of first instance has allowed to the plaintiffs a decree for arrears of rent at the rate of Rs. 104-3-6-p. for the years 1327 and 1328 and at an enhanced rate of Rs. 159-6-3 for the years 1329 and 1330 B. S. with cesses at six pies in the rupee and interest at 12½ per cent per annum. Against this decision, an appeal was carried to the District Judge and the learned District Judge has affirmed the decision of the Court of first instance. Against this decree of affirmance by the lower appellate Court, a second appeal has been taken to this Court, as already stated, by the plaintiffs.

The main contention of the appellants before us has been that the Courts below have clearly erred in dismissing the suit of the

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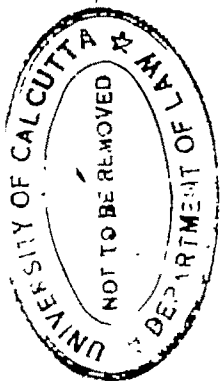
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plaintiff Company for the years 1323 to 1326 and in allowing them arrears of rent for the years 1327 and 1328 at the old rate. It is said that the lower Courts should have granted a decree to the plaintiffs at the enhanced rate for the years 1323 up to 1328. The argument of the appellants is based on the contention that, as the proceedings under section 46 of the Bengal Tenancy Act ascertaining the fair and equitable rent were proceedings in the nature of a suit for enhancement of rent, the provisions of section 154 of the said Act were attracted to the case and that consequently the plaintiff Company were entitled to get rent at the enhanced rate from, at any rate, the year 1323 B. S. This argument assumes that the enhancement agreed to by the tenants respondents in this case was really an enhancement made by the Court. It becomes necessary, therefore, to examine some of the provisions of the Act for the purpose of determining whether the enhancement in the present case which was agreed to on the 5th November 1921 was an enhancement made by a decree of the Court so as to attract the provisions of section 154. Section 43 says "The rent of a non-occupancy raiyat shall not be enhanced except by registered agreement or by agreement under section 46." It appears in this case that, after the Munsiff had determined the fair rent on the 28th September 1921, the tenants agreed to pay the rent so determined within the meaning of section 46 clause (7). Section 46 clause (7) states "If the raiyat agrees to pay the rent so determined, he shall be entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement." It is not necessary to quote the remaining part of this clause. The contention of the appellants that this enhancement was really made by the decree determining the fair and equitable rent under section 46 loses its force when the scheme of the whole section is considered. Section 46 provides that the Court is to determine the fair and equitable rent of a non-occupancy raiyat and then, after the determination of such rent, if the raiyat does not execute the agreement and file it under sub-section (3), he shall be deemed for the purposes of the section to have refused to execute it. Sub-section (7) says that if the raiyat agrees to pay the rent so determined, he shall be entitled to remain in occupation of the holding for five years from the date of the agreement. This shows that the agreement is to take effect from the date when it is entered into. It has been strenuously argued before us by the learned Advocate for the appellants that this is not to be treated



as a case of an agreement between the parties, that is, between the landlords and the tenants but it is to be treated as an election of an alternative order made by the Court which determined the fair and equitable rent. This is a contention to which I cannot agree. Section 43 in express terms states that the rent of a non-occupancy raiyat can be enhanced by agreement under section 46; and that is the agreement which is referred to in section 46 (7). The liability of the tenant to pay enhanced rent is not dependent on the decree which merely stops short after determining what the fair and equitable rent is. The liability really attaches from the time when the tenant agrees to pay the rent so determined. This view receives support from the decision of the Patna High Court in the case of *Mussammatt Bibi Wafikhunnissa Begum v. Babu Lal Mahtan* (1) and I shall refer to some of the observations made by Sir Dawson Miller C. J. in that case which are pertinent to the present controversy. It is conceded that the case referred to is directly in point. The learned Chief Justice at p. 53 of the report expresses himself thus on the point with which we are now dealing: "But it seems clear that the enhanced rent is payable at the latest from the date when the raiyat agrees to pay the rent determined by the Court. Sub-section (7) does not in terms say from what date the enhanced rent should be payable. It merely states that the raiyat shall be entitled to remain in occupation of his holding at the enhanced rent for a term of five years from the date of the agreement. But, as his liability to pay the enhanced rent only arises by reason of his agreement, it seems to me impossible to hold that he was under any 'liability to pay the rent at the enhanced rent' before that date. The fact that the defendants did not, in fact agree to pay the enhanced rent until a much later date than that on which they might have been put to their election appears to have been due to the failure of the plaintiff to insist upon her rights: she could have compelled the defendants to pay the new rent or submit to ejectment as soon as the Munsiff's decision was given unless the Court ordered a stay which would only be granted on terms protecting the plaintiff's right." It seems to me clear on a consideration of the provisions of sections 43 and 46 of the Bengal Tenancy Act that the contention of the appellants must fail.

There is another consideration which inclines me to take the view that the appellants' contention is without force because the term of five years referred to in section 46 (7) cannot possibly

(1) (1925) I. L. R. 5 Pat. 46.

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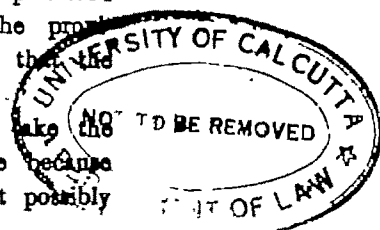
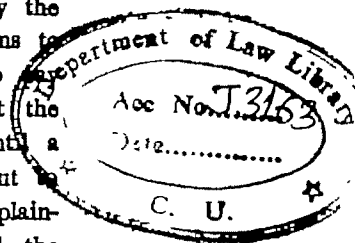
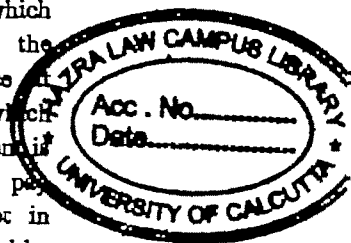
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refer to five years subsequent to the time when proceedings under section 46 were started in the year 1913, for, that period, according to this view, expired long before the date of the agreement. If the right is founded on agreement, as I think it is, it seems impossible to contend that the agreement would take effect, as in the present case, for about 8 or 9 years, prior to the date of the agreement. The appellants, however, will be entitled, in the view which I have expressed as to the date from which the tenants became liable to pay enhanced rent, to get such rent for nearly six months more from the 19th Kartick to the end of Chaitra 1328,

The result is that the decrees of the Courts below are varied by directing that the plaintiffs shall get a decree for the sum which has been awarded to them by these Courts and also for an excess sum of Rs. 25-5; subject to this variation, the appeal will stand dismissed. In the circumstances of the case, there will be no order as to the costs of this appeal.

Jack, J.—I agree.

D. K. R.

Appeal allowed; Decree varied.

*Before Sir George Claus Rankin, Knight, Chief Justice
and Mr. Justice B. B. Ghose.*

NAGENDRA NATH BANERJEE

v.

AMBICA CHARAN CHAKRABARTY AND ANOTHER.*

CIVIL.

1929.

May, 14.

*Limitation—Indian Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—
Amended decree—Appeal—Execution—Computation of time—Terminus a
quo—Civil Procedure Code (Act V of 1908), O. XXI R. 16—Sub-
mergences of the decree—Right to execution—Person interested in the
decree.*

* Appeals from Appellate Orders Nos. 101 and 134 of 1928, against the orders of G. C. Sankey Esq., District Judge of 24 Parganas, dated the 7th November, 1927, reversing the orders of Mr. Hem Chandra Das Gupta, Subordinate Judge, 3rd Court at Allpore, dated the 16th May, 1927.

An appeal from an amended decree like that from any other decree postpones the date from which limitation runs for execution purposes.

The broad principle as regards execution matters is that time is not computed from the date when the right to apply accrues but is postponed in cases where there is an appeal.

A final mortgage decree was passed on the 10th. of October 1917. On the 8th April 1919 on the application of the decree-holder, that decree was amended. The judgment-debtor preferred an appeal to the Court of the District Judge who modified the amended decree. From that decision an appeal was taken to the High Court which was dismissed on the 24th of July 1924. The decree-holder then presented an application for execution of the decree on the 18th November 1925 :

Held, that the application was not time-barred ; that the correct date for determining the time of limitation under Art. 182 of the first schedule to the Limitation Act was the 24th July, 1924.

After the application for execution was presented by the original mortgagee decree-holder a sub-mortgage of the said decree for Rs. 900 was made in favour of K, the appellant which provided that "K would be competent to realize the above sum being added as a party to the above execution case jointly with us. K would be competent to withdraw the sum due to him together with interest and costs..... Should the original mortgagees fail to pay the money lent within..... K would be competent to realize the sum due to him by bringing a suit against his borrowers or by execution of the above decree in his own name" :

Held, that K comes within the description of persons given by Rule 16 of Order XXI, Code of Civil Procedure, and has sufficient interest in the decree to proceed with the execution.

In Appeal No. 101 of 1928 : Appeal by the Transferee of the decree.

In Appeal No. 134 of 1928 : Appeal by the Sub-mortgagee of the decree of which execution is sought.

Application for execution.

The material facts will appear from the judgment.

In No. 101 :

Mr. Asita Ranjan Ghose (for *Mr. Bankim Chandra Mukerji*), with *Messrs. Pramatha Nath Mukerji* and *Urukramdas Chakrabarty* for the Appellant.

Messrs. Brojo Lal Chakrabarty, Hira Lal Chakrabarty and *Dwijendra Nath Dutt* for the Respondent.

In No. 134 :

Messrs. Amarendra Nath Bose, Arun Chandra Bose and *Dwijendra Nath Dutt* for the Appellant.

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Messrs. Brojo Lal Chakrabarty and Hira Lal Chakrabarty for the Respondents.

The judgments of the Court were as follows :

No. 101 :

Rankin, C. J. :—In this case, it appears that one Nagendra Nath Banerjee has appealed from an order dismissing the application for execution of one Kartik Chandra sen. This appeal cannot be sustained and must be dismissed with costs—hearing-fee two gold mohurs.

No. 134 :

In this case, an application for execution has been made by Kartik Chandra Sen who is a sub-mortgagee of the decree of which execution is sought. The first question is the question of limitation. The lower Court has found that execution is time-barred. The facts are these : The decree in question which appears to have been a final mortgage decree was passed on the 10th of October 1917. On the 8th April, 1919, on the application of the decree-holder, that decree was amended. It was amended upon more than one point. It was amended in respect of interim interest ; it was amended upon some questions of costs and there was a further question of post-diem interest at six per cent upon which it was also amended by the trial Court. From that decree as amended, the judgment-debtor appealed and the learned District Judge modified the amended decree in this way that, while a part of the matter which had been added to the decree by way of amendment was retained, another part, namely, that relating to post-diem interest was set aside. From that decision of the District Judge, an appeal was taken to this High Court which was dismissed on the 24th of July 1924.

Now, the petition for execution in this case was presented on the 18th November, 1925. The question is what is the terminus a quo from which time has to be computed under article 18a of the first schedule to the Limitation Act of 1908. It seems reasonably clear that the date 10th October 1917—the date of the original decree—cannot be the period of time from which limitation runs because that decree was modified in various ways by subsequent orders, and so to hold would be contrary to the fourth clause of article 18a. The next date which may be considered is the 8th April 1919 on which date the decree was amended. It has been contended before us, that, on a strict interpretation of article 18a, that really is the correct date. I am of opinion that that too cannot be the correct date because it is quite clear that, from that

amendment or from the decree as amended on the 8th April 1919, an appeal was brought and the decree was subsequently modified so that it ceased to be in all respects the test of the liability of the parties. The question, therefore, is whether the next date—the 21st January 1922—the date on which the District Judge modified the amended decree—can be regarded as the date from which limitation runs. No doubt, it would be the date from which limitation runs. No doubt, it would be the date from which limitation would run but for the fact that an appeal was brought from that decree of the District Judge which appeal was dismissed on the 24th July 1924. We have to consider whether it is true to say the case of an appeal from an amended decree is different from the case of an appeal from any other decree so that, while it is clear law that an appeal from any other decree postpones the date from which limitation runs for execution purposes, an appeal from an amended decree has no such operation. In my judgment, there is no ground either upon a strict construction of article 182 or in principle for that contention. The matter may be looked at in this way: When a decree is amended and for this purpose it matters nothing whether in amending the decree the Court has confined itself within the powers given by section 152 Code of Civil Procedure or not—the only decree that exists is the decree as modified by the amendment and the only decree from which an appeal can be brought is the existing decree by which the proposed appellant is aggrieved. For the purpose of computing limitation for appeals, the law is clear enough. Under the Civil Procedure Code, a decree has to be dated as of the date of the judgment. The appeal has to be brought within a certain time from the date of the decree. Whether a decree is amended or is not amended, the date of the decree is the date of the judgment and the fact that the decree is amended does not operate of itself to extend the time for appealing. That goes back to the date of the judgment and not to the date either of the drawing up of the decree or of the date of the amendment. Accordingly, when there has been an amendment and it is reasonable that the time for appealing should be extended recourse has to be had to the power of the Court under section 5 of the Limitation Act. There is no appeal from an order granting an amendment as such, unless indeed it be considered, as sometimes it has been considered, as a question of review in which case it may be possible to maintain an argument that there can be an appeal from that order. But the view taken in such a case, as *Brojo Lal v. Tara Prasanna* (1) is that the correct course is to get

(1) (1903) 3 C. L. J. 188.

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an extension under section 5 of the Limitation Act and that the appeal that is brought, is brought from the decree, that is to say, from the amended decree because there is no other decree in existence. In this case, we have to remember that, when the appeal was brought to the District Judge, it was an appeal from the final decree of the 10th October, 1917, the circumstance that it had been amended being a circumstance which has no fundamental importance in this case—though it might have had importance if any question had arisen about the appeal being in time. The District Judge, when on the 31st of January 1928 he modified the amendment, really modified the decree dated the 10th October 1917—the only decree that existed in the case. Under these circumstances, we have to ask ourselves whether there is any ground in logic or in the language of the Limitation Act for refusing to apply the broad general principle that a decree operates as *res judicata* but when it is appealed from the matter becomes again subjudice, and for execution purposes the party, although he is allowed to levy execution notwithstanding an appeal, is not, as a matter of limitation, required to do so until the appeal has been disposed of—a principle which dates so far back as 1871 and was enunciated in the judgment of Mr. Justice Dwarkanath Mitter in *Ram Charan v. Lakkhant* (1). The sole special feature is that the decree which the District Judge modified was a decree which had been amended. I am of opinion that on principle such a decree is exactly like any other decree and it is of no materiality for the present purpose whether the decree of the 10th October 1917 had been amended or had not been amended. If we look at the language of Article 182, it is quite true that the fourth clause merely says that where a decree has been amended the time runs from the date of the amendment, but there is provision in the second clause which deals with the question of appeals to say that appeals in the case of amended decrees are any different in their effect upon limitation from appeals in the case of other decrees. The only thing that was necessary in 1908 was to deal with the simple case of a decree which afterwards was amended and to give an extension of time for that. Mr. Brojolah Chuckerburty in a very able argument has referred to the case of *Hari Mohan Dalal v. Parameswar Shan* (2). That was a case where the question arose under Article 181 of the first schedule to the Limitation Act. Now, there is this broad contrast

(1) (1871) 7 B. L. R. 704.

(2) (1928) 32 C. W. N. 971.

between Article 181 and Article 182 that, under the residuary Article 181, time runs from the date, to use the exact language of the statute "when the right to apply accrues." In execution matters, that is not usually the case. It never is the case of execution purposes that an appeal by itself operates as a stay. There is the right to execute the moment a decree is passed; but if there is an appeal the time of limitation is postponed and does not run until the decree determining the appeal is made. So, the broad principle in India as regards execution matters is that time is not computed from the date when the right to apply accrues, but is postponed in cases where there is an appeal. It does not, therefore, seem to me that any case under Article 181 can be expected to throw light upon the true position on a question of execution under Article 182. The case in question was a case under section 144 of the Code and the question was whether the right to apply for restitution arose under Article 181 on the date of the order or on the date of the decree dismissing the appeal. It seems to me that there is a very broad distinction which would prevent us from regarding the case as being in point. In my judgment, therefore, there is no escape from the conclusion that the correct date for determining the time of limitation is the 24th of July 1924.

I would here observe that the fact that to amend a decree has consequences under Article 182 and otherwise is very well worth bearing in mind when Courts are asked after an interval of eighteen months to amend a decree. On a mere question as to whether the plaintiff should get such and such a sum of money or a little more, I should have thought that no application to amend a decree ought to be entertained after so much as eighteen months. If a person came three weeks afterwards, I would not be surprised that his application was entertained. If he came three months afterwards, one might think it a bad case, but be open to consider whether there was reason which could justify the delay. When a person comes eighteen months afterwards to ask that a provision about interest be added to his decree, it would be a very good thing if the lower Courts would appreciate the consequences of entertaining such an application and would refuse to entertain an application of this character. If it be true that the appeal to the District Judge was an appeal from the amended decree bearing the date 10th October 1917 though amended by an order of the Court dated the 8th April 1919, it may be the right view that the Court of appeal had only to consider whether the decree as it stood was a proper decree to have been passed.

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I understand that in this case the view which was ultimately taken by the High Court was not that post-diem interest was an improper thing to order in itself but that it was a thing which was improperly added under section 152 Code of Civil Procedure. Whether that is a matter proper to be considered when an appeal is brought from an amended decree is a question of some importance upon which I do not desire now to pronounce any opinion.

The next question which we have to determine is whether Kartik Chandra Sen is a proper person having regard to order XXI rule 16 Civil Procedure Code to make an application in execution. If he is, then a further question will arise in the course in the execution proceedings as to whether Nagendra Nath Banerjee who appears to have been a subsequent transferee of the decree has or has not got priority. We have only to decide whether Kartik Chandra Sen is a proper person at whose instance the decree can be executed; in other words, whether he is a person to whom the decree has been transferred by an assignment in writing. We have before us the document under which he takes his interest in this decree. It is a mortgage for a certain sum of money—Rs. 900—carrying a certain rate of interest and the mortgage is not a mortgage in general terms but has a certain specific provision. At the time, apparently an application for execution had been made by the original mortgagee and the mortgage provided that Kartik Chandra Sen would be "competent to realise the above sum by being added as a party to the above execution case jointly with us." It was further provided that, if the defendant deposited the sum due under the decree, Kartik Chandra would be competent to withdraw the sum due to him together with interest and costs. It was further provided that, should the original mortgagees fail to pay the money lent within a certain period, Kartik Chandra Sen would be competent to realise the sum due to him by bringing a suit against his borrowers or by execution of the above decree in his own name. In these circumstances it appears to me that Kartik Chandra Sen is within the description of persons given by rule 16 of Order XXI Code of Civil Procedure and that his application for execution cannot be dismissed on the ground that he has no sufficient interest in the decree.

In these circumstances, this case must go back to the Court of execution and it will be for that Court of execution to see that any sum that is recoverable in the process of execution is pro-

perly distributed between the parties entitled to get it and to make such order as regards payment of money out of Court as may seem necessary.

The present appeal must succeed. The appellant must have his costs against the judgment-debtors. The hearing fee in this Court is assessed at three gold mohurs.

B. B. Ghose, J: I agree.

D. K. R. *Appeal No. 101 dismissed; Appeal No. 134 allowed; Case remanded.*

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and Sir Charu Chunder Ghose, Knight, Judge.*

NANI LAL MANDAL

v.

PRIYANATH RAY AND ANOTHER.*

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February, 22.

Limitation—Special rule—Bengal Tenancy Act (VIII of 1885); Sch. III—Suits for Jalkar rent—Agreement for lease in respect of Bheri land—Jalkar—Liability to repair embankments in the interest of fishing—Case, if covered by 'rights over fisheries'—Bengal Tenancy Act, Section 193—Applicability.

A memorandum of agreement for lease for a term of 3 years in respect of the right to fishery over two pieces of Bheri land, goes to describe those two pieces of land as Bheri Jami Jalkar and it recites that those two pieces of Bheri land Jalkar are in the possession and enjoyment of the grantees under a previous lease. It then recites the terms of agreement thus: "that for the right to fishery over the first Bheri Rs. 500 shall be paid in advance as solami and the rent shall be fixed at Rs. 3000 per annum and that for the right to fishery over the other Bheri land Rs. 500 shall be paid in advance as solami and the rent shall be fixed at Rs. 1500 per annum On the aforesaid understanding we take lease of the said two pieces of Bheri land Jalkar running from and having the right of possession over the said two pieces of Bheri land Jalkar

*Appeal from Appellate Decree No. 635 of 1927, against the decree of L. B. Chatterjee Esq. 1st Additional District Judge of 24-Perganas, dated the 10th January, 1927, modifying the decree of Baba Suriya Moul Deo, Subordinate Judge, 2nd Court, at Allpur, dated the 28th April, 1926.

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as Nij jote execute this kabullat ... We shall at our own cost make necessary and regular repairs of the sluices and the embankments surrounding the Bheri during the term of the lease and we shall make other necessary expenses. We shall be in possession by growing fish and catching them We shall keep in tact the boundary and shall make regular repairs of the embankment on all sides strong and durable as they were previous to our taking the lease." In a suit brought by the plaintiff for recovery of arrears of rent in respect of the said jalkar :

Held, that the case is covered by the expression "rights over fisheries" provided in section 193 of the Bengal Tenancy Act and that the special rule of limitation provided in the Bengal Tenancy Act is applicable to this case.

Krishna Lal Choudhuri v. Salim Mahomed Choudhuri (1) and *Mahamunda Chakravarti v. Mengala Kestani* (2) referred to.

Appeal by the Defendant.

Suit for recovery of rent of a jalkar.

The material facts will appear from the judgment.

Messrs. Rishindra Nath Sarkar, Nasim Ali and Diptendra Mohan Ghose for the Appellant.

Dr. Bijan Kumar Mukherji for the Respondent.

The judgments of the Court were as follows.—

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Rankin C. J. : In this case the question is whether the claim by the plaintiff must be deemed to be subject to the special rule of limitation laid down by the Bengal Tenancy Act. That rule of limitation gives 3 years only for the bringing of the plaintiff's claim. Now the claim is in respect of rent of a jalkar. But the question before us depends to some extent on whether that description is adequate and sufficient and we have to turn in this case to the language of the memorandum of agreement between the parties. That agreement is an agreement in writing dated the 4th January 1918 and according to the English translation before us it is called a memorandum of agreement for lease for a term of 3 years in respect of the right to fishery over two pieces of Bheri land. The first of these two pieces of Bheri land is described as Gobardanga Bheri surrounded on all sides by embankment. The second piece of Bheri land is described as Santiram Nashkar Bheri land surrounded on all sides by embankment. The document goes on to describe the two pieces of land as Bheri jami jalkar and it recites that these two pieces of Bheri land jalkar are in the possession and enjoyment of the grantees under a previous lease. Then it recites that a proposal has been made for granting a lease of the said Bheri land jalkar and the terms

(1) (1914) 19 C. W. N. 514.

(2) (1904) I. L. R. 31 Cal. 937.

of the agreement are these: that for the right to fishery over the first Bheri Rs. 500 shall be paid in advance as selami and the rent shall be fixed at Rs. 3000 per annum and that for the right to fishery over the other Bheri land Rs. 500 shall be paid in advance as selami and the rent shall be fixed at Rs. 1500 per annum. In this way the total annual rent of the said two pieces of Bheri land jalkar is fixed at Rs. 4500. It then recites, "On the aforesaid understanding we take lease of the said two pieces of Bheri land jalkar running from a certain month and having the right of possession over the said two pieces of Bheri land jalkar as Nij-jote execute this kabuliat" in terms therein described. The document then recites "We shall at our own cost make necessary and regular repairs of the sluices and the embankments surrounding the Bheri during the term of the lease and we shall make other necessary expenses. We will be in possession by growing fish and catching them." There are various provisions as to the payment of rent. The grantees further covenant in these terms: "We shall keep intact the boundary and shall make regular repairs of the embankment on all sides to keep them as strong and durable as they were previous to our taking the lease."

Now we have to consider whether the provisions of section 193 of the Bengal Tenancy Act are applicable to the claim by the plaintiff for rent contracted for in this agreement. The language of the Act we have to deal with is this: "The provisions of this Act applicable to suits for the recovery of arrears of rent shall, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of any rights of pasturage, forest rights, rights over fisheries and the like." Now the first thing that is argued before us by the learned Advocate for the respondent is that the general principle of the matter is this that jalkar rights do not come under the Bengal Tenancy Act unless they are part of agricultural holdings. That principle I shall for the purposes of this case accept. Then we have the particular provision in section 193. The argument on that section is not that we have to read into this section a provision that the section shall apply in respect of rights of pasturage, forest rights, rights over fisheries "being parts of agricultural holdings" but that in order to come within this section the rights over fishery must be pure incorporeal rights and that if for any purpose there is any right in the land itself whether it is purely ancillary to the purpose of fishing or not the section does not apply. It is said that if we apply the section to a case of this sort we would be violating a

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principle governing these matters, and making the Bengal Tenancy Act applicable to cases where certain rights are granted in the land which are not rights granted for agricultural purposes. In my opinion, that is not the way in which this section is to be looked at or to be considered for the purposes of the present case. The learned Additional District Judge has held that section 193 of the Bengal Tenancy Act does not apply to this case because the tenant was expressly given certain rights in respect of the embankments, outlets, etc. He says: "This to my mind created some sort of right in the soil and in the attached land (the embankments) although the right be confined to the raising of it or repairing of it regarding to the necessity of the tenants although the same was to be restored in its original condition to the lessor on expiry of the term of the lease." In other words it is stated that if there is any right given in the land then section 193 cannot possibly be applied. In support of that contention the case of *Krishna Lal Choudhuri v. Salim Mahamed Choudhury* (1) is cited to us. It appears that there it was contended that the lease not merely conferred a right over fishery but also created an interest in the land and that accordingly it did not come within the purview of the Bengal Tenancy Act. In that particular case the Court was in no difficulty in finding an answer to that contention because on an examination of the lease it turned out that it did not convey any interest in land over and above the mere grant of a right to fishery and on that view it was not necessary to struggle with any difficulty at all. We have also been referred to the case of *Mahavanda Chakravarti v. Mongola Kestani* (2) where for reasons which do not appear to be very cogent to me it was argued that because the rent was a definite rent per annum the tenant taking the risk of being able to get enough fish from the tank, the letting was not the letting of a mere jalkar. On looking at the agreement before me it appears to me that it is a question of fishery and nothing but fishery throughout. The language of the section is not right of fishery but rights over fisheries and that expression comes after such special rights as pasturage and forest rights and is succeeded by the general phrase "and the like." I have to refer to this document to see whether this is a case of rights over fishery or something more. I need not say that I quite agree that if you look at a letting and find that it is a letting for residential purposes of certain land coupled with a letting of a right to fishery

(1) (1914) 19 C. W. N. 514.

(2) (1904) 1. L. R. 31 Calc. 937; 8 C. W. N. 804.

with a single rent reserved for both, the case would not come within the purview of section 193. In the same way if in this case it was open to the tenant to use the embankment for non-agricultural purposes with no reference to fishery e. g., for industrial purposes, paying a consolidated rent for the whole thing, it would not come under section 193. When I come to the agreement in this case it appears to me perfectly true as the learned Additional District Judge says that some sort of right in the soil may be created by the grant. But what sort of right in the soil? If it refers to the right of user of the land and water for the purpose of fishing, or if it refers to the liability undertaken by the grantee to repair the embankment in the interest of fishing, it does not seem to me that it in any way conflicts with principle to hold that the case is covered by the expression "rights over fisheries" to be found in section 193. One of the conditions upon which the considerable amount of rent was agreed to for the right of fishing over this water was that the grantee should be entitled to use the embankment for the purposes of growing fish or catching them and also to use the embankment for the purpose of keeping their obligation to repair the embankment in order that their fishing rights might not be affected. There is no suggestion in this document of the grantee having a right to use the embankment for purposes unconnected with fishing and unconnected with agriculture.

I therefore, think that the special rule of limitation does apply to this case and that this appeal must be allowed and that the suit must be dismissed with costs in this Court and in the Courts below.

C. C. Ghose, J. : I agree.

D. K. R.

Appeal allowed.

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February, 26.

HAZI TILLOIN MAHAMMAD UMAR BUKSH

v.

THE BENGAL NAGPUR RAILWAY CO. LTD.*

Damage—Railway consignment—Risk Note Form 'H'—'Loss'—Meaning of—Perishable goods, damage of—Railway Company if liable.

Where a person sends perishable goods in Railway consignments under Risk Note Form H and those goods are damaged :

Held, that the Railway Company is not liable for such damage under that Risk Note Form H which makes the Railway Company liable only in case of loss of the goods consigned.

The term "loss" in the Risk Note Form 'H' means loss of a complete consignment or one or more complete packages. It does not mean destruction or deterioration of or damage to the goods consigned. The Railway Company could not be liable merely because there was a pecuniary loss to the owner of goods : *The East Indian Ry. Co v. Jaggat* (1) followed : *M. & S. M. Ry. Co. v. Subba Rao* (2) dissented from.

Appeal by the Plaintiff.

Suit for damages.

The material facts will appear from the judgment.

Sir B. C. Mitter, Mr. C. C. Biswas and Mr. Rabindra Nath Chowdhuri for the Appellant.

Mr. S. N. Bose, Mr. Amulya Chandra Chatterjee and Mr. Prohash Chandra Pakrashi for the Respondents.

The judgments of the Court were as follows :—

Rankin C. J. :—This is an appeal from a judgment and decree of the learned First Additional District Judge of the 24-Parganas and the case has reference to a consignment of oranges in a wagon from Nagpur to Howrah upon the terms of a certain Risk Note in Form H. The goods were consigned on the 4th of April 1923 and they were to go by passenger train and the wagon commenced its journey on the 5th of April. Apparently the wa-

* Appeal from Appellate Decree No. 641 of 1927, against the decree of N. G. A. Edgley First Additional District Judge of 24-Parganas, dated the 28th September, 1926, reversing the decree of Moulvi Osman Ali, Subordinate Judge, 4th Court of, 24 Parganas, dated the 3rd May, 1926.

(1) (1924) I. L. R. 51 Cal. 615 ; 28 C. W. N. 1001.

(2) (1919) I. L. R. 43 Mad. 617.

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gon was not in a fit condition for travel because after some forty miles it was found that its axle was too hot. Thereupon it became necessary to transfer the goods to another wagon and much complaint is made that this was not done with sufficient celerity. It is said that this operation was not completed until the 8th. The wagon into which the goods were put again became unfit for travel and at Bilaspur the goods had to be once more transhipped. These goods which had been put on rail on the 4th April did not arrive at Howrah until the 12th April. It would appear that they were fresh oranges but that upon their arrival at Howrah they were so decomposed or deteriorated that they were unfit for any purpose. They were in a rotten condition and when the plaintiff came to take delivery it was found that the goods were not worth taking delivery of. A certificate from the Sanitary Inspector was obtained and the best course was adopted in the interest of all the parties, namely, that the wagon load of rotten oranges was taken to a proper place and the oranges were destroyed. In these circumstances the plaintiff claimed damages and the learned Judge has found in favour of the plaintiff that the failure to tranship these oranges at Bhandhara with reasonable quickness was not only negligence on the part of the Railway Company's servants but was wilful negligence. The language of the learned Judge is not too accurate but he says that "the conduct of the station staff at Bhandhara appears to me to have been not only negligent but also reckless and careless." However, the learned Judge does mean to find that there was a case made out within the meaning of the Risk Note and that the case made out was one of wilful neglect of the Railway Company's servants.

We have not heard the respondent in this appeal and I say nothing about the question whether this neglect is really wilful neglect or not. It appears to me that something might be said on either side. Assuming, however, that it is wilful neglect, the question arises whether the neglect, such as it may be, of the Railway Company's servants, is a neglect for which the Railway Company is responsible. By this Risk Note the consignor undertakes to hold the Railway Company "harmless and free from all responsibility for any loss, destruction or deterioration of or damages to all or any of such consignments from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration

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or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway."

The first question which arises is what is the plaintiff's cause of action? He says that these oranges arrived at Howrah in a rotten condition and prima facie it seems to me that it is quite clear that he has the general terms of this clause against him. His claim is a claim which involves making the Railway Company responsible either for loss, destruction or deterioration of or damage to these oranges, and there is no way of putting the plaintiff's claim that does not bring it within the ambit of the general words of the clause. In these circumstances quite logically and reasonably the debate in this case has proceeded upon the question whether the plaintiff can say that his case comes within the exception which is in the following words: "except for the loss of a complete consignment or of one or more complete packages forming part of a consignment." That is the question to which the learned Judge has addressed himself and he has held that there has been no "loss" in the sense in which that word is used in this Risk Note. I agree with the learned Judge on that point. It seems to me that the language of this particular clause points plainly to this that destruction or deterioration of or damage to the goods is a thing which the Railway Company are not to be responsible for at all. The only thing for which in certain events they are to be responsible is "loss", that is to say, loss of all or any of such consignments and they are to be responsible for that only when there is a loss of a complete consignment or one or more complete packages. All arguments based upon the notion of loss as meaning monetary to pecuniary loss to the consignee have to be put on one side, and I agree with Mr. Justice Page in his view of the meaning of this word as stated in his judgment in *The East Indian Railway Co. v. Jogpat Singh* (1). I disagree with the view taken by the Madras High Court in the case *The Madras and Southern Mahratta Railway Co. Ltd. v. Mattai Subba Rao* (2). Marine Insurance notions about what is total loss—either actual total loss or constructive total loss—have nothing to do with this word as used in this Risk Note, and we are not concerned with the many wide meanings that such a word is capable of having in common parlance. We are concerned with

(1) (1924) I. L. R. 51 Cal. 615; 28 C. W. N. 1001.

(2) (1919) I. L. R. 43 Mad. 617; 38 M. L. J. 360.

the definite meaning which appears upon this particular exception. We have to say whether this particular consignment has been lost within the sense of this Risk Note remembering that it is perfectly clear that destruction or deterioration of or damage to these goods is a risk which the Railway Company does not take even in a case of wilful neglect.

In my judgment, the position here is that these goods deteriorated. They deteriorated because they were in transit for a longer time than ought to have been required. They took a longer time than should have been required owing to the negligence of the Railway Company. Of that I have no doubt. For the moment I will assume that the length of time taken in the transfer, as the learned Judge notes, was owing to the wilful neglect of the Railway Company's servants. In these circumstances it seems to me that this is not a case of loss at all. These goods were never lost. What happened was that they deteriorated and became worth nothing. There was a pecuniary loss no doubt but the goods themselves were not lost. In that view it appears to me that it is necessary to consider carefully the evidence as to what happened at Howrah. I am not saying that if the goods were detained so long in the transit that they became rotten and could not be delivered if, for example, at some intermediate station they had to be taken out and thrown away, or even if they had to be thrown away after they arrived at Howrah and so could never have been delivered I am not saying whether in either or both of these cases the plaintiff might not have said that there had been a loss of the goods. It is not necessary to pronounce upon that, because I am satisfied that in this case that is not what happened. In this case what happened was that the goods being useless and being of such a character that the sensible thing to do was to destroy them, they were destroyed. I am not satisfied that it was impossible for the Railway Company to give delivery of the goods to the plaintiff. I am not satisfied that the plaintiff had no option, or that it was illegal for him to take delivery of these goods. What happened merely was that the goods being rotten they were in fact by consent destroyed which was the sensible thing to do. The Railway Sanitary Inspector gave a certificate first to afford the plaintiff proof of the condition of the goods and secondly because the Railway staff would want some authority to destroy the goods.

When one looks at this Risk Note one finds that it is a Risk Note in a form that is applicable to the carriage of goods and animals. It is not a Risk Note which has any special reference to

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perishable goods such as oranges, and the contention that is really raised upon this Risk Note is this that if perishable goods are sent under Risk Note H so that in consequence of delay in transit they become useless, then the protection which the Railway Company have stipulated for entirely vanishes. It is said that because they become entirely useless, it is no longer a question of deterioration or destruction, but a question of loss. In my judgment, so to construe this Risk Note would be to give it a meaning which it was never intended to bear. It would give it a meaning with reference to perishable goods which would defeat the plain intention of the contract. "Loss" in this case is not used with reference to perishable goods in particular. The contract is dealing with ordinary goods and when it says "the loss of a complete consignment," it is not to be construed as though it were a part of the special intention of that phrase that it is to be applied to highly perishable goods.

Learned Counsel Sir Benode Mitter has put before this Court various arguments and contentions and has cited opinions from certain other Courts to the effect that the Calcutta decisions as to the meaning of this word "loss" place too narrow a construction on this Risk Note. I can only say for myself that I am entirely of the opposite opinion: I think the Calcutta decisions place a meaning upon the words in this Risk Note which it can be seen to bear by a careful study of the Risk Note itself.

If a person entrusts goods to a Railway for carriage to X and for delivery to himself or to his consignee and if the Railway fails to give delivery his *prima facie* right is to sue the Railway for his goods and for damages for their detention. Nothing in these risk notes is intended to enable the Railway to keep other people's goods nor are Railway Companies as a rule so unreasonable as to seek so to do. These Risk Notes come into operation in the much more common case where the Railway Company cannot deliver the goods because it has not got them. Then a question arises of its "responsibility for any loss of all or any of such consignments" to use the words of the Risk Note before us. The words "loss destruction or deterioration" are followed by the words "loss of a complete consignment" and the word "loss" means the same thing in both cases. The word "destruction" is not repeated and this of itself points firmly against any extension of the meaning to be given to the word "loss". The loss of goods, in the sense in which this Risk Note is concerned with it is a question of presence or absence and not of condition. However little it may matter to a trader

whether his goods are destroyed, whether they are delivered to him in a useless condition, or whether he never gets delivery at all to a Railway Company carrying all sorts of goods and animals these eventualities represent very different risks. Moreover from this point of view "the loss of a complete package" is a different thing from the loss of some of the contents of a package. A consignee who proposed to insure his goods for the transit would soon find out these differences and a consignee who proposes to be his own insurer would be well advised to learn them.

The next point which arises has been dealt with by the learned Judge in a manner which is I think correct in its result. It was argued before the learned Judge that there was no alternative for the despatch of fresh oranges from Nagpur to Howrah and that the plaintiff could only despatch them on owner's risk terms. When we come to consider the logic of that argument and what it has to do with the question of this contract I can only say that while I paid attention to the argument of Sir Benode Mitter, I have failed to find that there is any ground for supposing that the existence of another method of consignment or of the non-existence of another method of consignment has any effect upon the validity of the particular contract before us. I do not understand why in the absence of proof that fresh fruits would have been accepted at Railway risk, this consignment note is supposed to be without consideration, nor do I follow the argument which apparently impressed the learned Judge that the existence of an alternative rate was a condition precedent to the operation of that portion of the Risk Note by which the Company contracted themselves out of their general responsibility. However, the learned Judge has found upon a construction of the documents laid before him that it is not shown that there was no alternative rate, and he has held that there was an alternative rate. The documents have been put before us. There is a document, first of all, of 1919 which purports to say that perishable articles are to be carried at the owner's risk. Then in 1920 came a series of arrangements, and I am satisfied, as the learned Judge was satisfied, that the notice of 1919 came to an end as regards the consignment of oranges from Nagpur to Howrah. There was a further document of 1921 and yet a further document of 1922 which have been laid before us. The 1921 document continued the 1919 arrangement only as regards certain named articles, sections or stations and as regards rates and fares "which are in force at present." For the present purpose, as we know, the arrangement of 1919 came to an end in 1920. Again in 1922 it

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appears that if a man must consign oranges from Nagpur to Howrah both in wagon-loads and by passenger train then the rate charged was a certain fixed rate. There is nothing whatever to show that there was no alternative course open. In my opinion, the learned Judge is right in his finding as to that and no cause of action arises to the plaintiff in this respect.

In my opinion, this appeal should be dismissed with costs.

C. C. Ghose, J. :—I agree.

D. M. G.

Appeal dismissed.

PRIVY COUNCIL.

PRESENT :—*Lord Shaw, Lord Darling, Lord Atkin, Lord
 Tomlin and Sir Lancelot Sanderson.*

RAJA SAHEB MEHARBAN-I-DOSTAN SRI RAJA
 RAO VENKATA KUMARA MAHIPATI SURYA
 RAO BAHADUR GARU, RAJA OF
 PITTAPUR

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
 REPRESENTED BY THE COLLECTOR
 OF GODAVERI.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
 AT MADRAS.]

Second appeal—Civil Procedure Code (Act V of 1908), Secs. 100, 101—Non-interference with erroneous finding of fact—Indian grant, what passes under—Rules of English Real Property Law inapplicable—Underground rights or minerals do not prima facie pass to grantee, in absence of express evidence that they formed part of the grant.

Under the Civil Procedure Code, 1908, no second appeal lies except on the grounds specified in section 100, (vide section 101 of the Code)

There is no jurisdiction to review or modify the finding of fact of the Judge of the first appellate Court, where there was evidence before the Judge upon which his finding of fact could have been based.

An erroneous finding of fact is a different thing altogether from an error or defect in procedure, (see sub-clause (c) of section 100, Civil Procedure Code,

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1908) and there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be : *Mussumat Durga Chendrain v. Jawahir Singh Choudhri* (1). followed

The rules of English Law as to real property in England afford no guidance as to what passes under an Indian grant. There is, accordingly, no presumption in India that in the absence of any evidence as to the terms of the grant the grantor parted with all his rights (including underground rights or minerals) in favour of the grantee. On the contrary, in the absence of any evidence that the underground rights were included in the grant they could not be treated as having thereby passed.

When a grant is made by a zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect : *Sashi Bhushan Misra v. Jyoti Prakash Singh Deo* (2) followed.

Appeal No. 72 of 1927 by the Plaintiff from a judgment and decree, dated the 31st March, 1925, of the High Court, Madras (*Phillips and Odgers JJ.*), reversing a judgment and decree, dated the 12th December, 1921, of the Additional Subordinate Judge of Cocanada, which affirmed a judgment (revised) and decree, dated the 21st June, 1920, of the District Munsiff of Poddapur.

The material facts of the case appear sufficiently from their Lordships' judgment.

The only question for consideration on the appeal to the Privy Council was whether the appellant, owner of the villages in suit, had the mineral rights therein.

In the High Court, reliance was placed by the plaintiff upon the then recent decision of the Privy Council *Satya Niranjan Chakravarti v. Ram Lal Kaviraj* (3) which, it was contended, modified the force of the previous decisions relating to mineral rights. Mr. Justice Phillips, in negating this contention, observed : "All that was decided in this last case was that the prior decisions of the Judicial Committee had not decided whether the grant of a Putni tenure did or did not convey the right to minerals, and that the particular Putni grant under consideration was held on the terms of the grant to convey the right to minerals but beyond this there does not appear to be any modification of the former decisions on the point. As I have already observed these decisions clearly lay down that the burden of proving the grant of the right to minerals lies upon the grantee. In the present

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(1) (1890) L. R. 17 I. A. 122 ; I. L. R. 18 Calc. 23.

(2) (1916) L. R. 44 I. A. 46 ; I. L. R. 44 Calc. 585 ; 25 C. L. J. 265.

(3) (1924) I. L. R. 4 Pat. 244 ; L. R. 52 I. A. 109.

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case that burden has not been discharged and consequently the decree of the lower Court is wrong. The appeal is allowed and plaintiff's suit dismissed."

Mr. Justice Odgers, in a concurring judgment, added :—"The case *Satya Niranjan Chakravarti v Ram Lal Kaviraj* (1) has been cited in this connection. That was only a construction of the deed of Putni settlement when the words made it plain that there was every intention to convey all below the surface as well as all above it. There being (in the present case) thus no evidence that there was any grant of the minerals either expressly or by implication, in my opinion the second appeal must be allowed and the suit dismissed."

De Gruyther K. C. and *Narasimham* for the Appellant.

Dunn K. C. and *K. Brown* for the Respondent.

De Gruyther, K. C. argued that there was no reservation of the mineral rights to the grantor at any time.

Dunn, K. C. for the Respondent : There is no evidence whatever establishing any grant of minerals. The appellant has to show that the right to the minerals passed.

(*Lord Sham* : There is nothing in the language used in the grant to show that there was any reservation of the minerals).

The State has a right to the minerals, unless the party claiming them can show a grant. The appellant has to establish a grant by which the minerals vested in him.

(*Lord Tomlin* : The question is whether the principle laid down in *Sashi Bhushan's case* (2), that an express grant must be shown, applies to the present case).

(*Sir Lancelot Sanderson* : The question must be decided according to the terms of the original grant. The lower appellate Court distinctly finds that there was a grant).

Refers to the Fifth Report, page 163, Vol. II (Madras).

De Gruyther, K. C. in reply : Refers to the Bengal Regulation VIII of 1793, section 14, as to who are Talukdars.

In India the man who pays the revenue is the proprietor of the soil.

During the course of the arguments, the following cases were cited at the Bar :—

Sashi Bhushan Misra v. Jyoti Prakash Singh Deo (2) ; *Secretary*

(1) (1924) I. L. R. 4 Pat. 244 ; L. R. 52 I. A. 109.

(2) (1916) L. R. 44 I. A. 46 ; I. L. R. 44 Calc. 585 ; 25 C. L. J. 265.

of *State for India v. Srinivasa* (1); *Collector of Trichinopoly v. Lekhamani* (2); *Raghunath Roy Martwari v. Durga Prashad Singh* (3); *Raghujirao Sahas v. Lakshmanrao* (4); *Stree Rajah Yammula Venkayamah v. Stree Raja Yammula Boochi Venkondora* (5).

Their Lordships' judgment was delivered by

Lord Tomlin :—The appellant in this case who is the plaintiff in the suit, and will be hereinafter referred to as the plaintiff, is appealing against a decree dated the 31st March, 1925, of the High Court of Judicature at Madras whereby the plaintiff's suit was dismissed and the plaintiff was ordered to pay certain costs.

The plaintiff as successor in title of his father holds 27 villages, formerly part of an estate known as the Totapalli estate situate in the Godavari district in the Northern Circars of Madras. These villages were purchased in 1879 by the plaintiff's father from the then holder and Mansabdar of the Totapalli estate.

In the years 1913 and 1915 the Tahsildar of Peddapur collected from tenants of the plaintiff in two of the 27 villages royalties or penalties for the removal of gravel and stone from hills within the boundaries of such two villages. He did so on the footing that the underground rights in the villages belonged to the Government.

Thereupon the plaintiff launched in the Court of the District Munsiff of Peddapur a suit against the defendant, the Secretary of State for India in Council claiming a declaration of his title to the underground rights in his villages formerly part of the Totapalli estate. He also asked an injunction to restrain interference with his rights and a refund of the amount collected from his tenants. The defendant denied the title of the plaintiff to the underground rights alleging that the Government retained the right to resume (*i. e.*, to re-assess) the Totapalli estate and that the underground rights were therefore vested in the defendant respondent. The substantial issue between the parties is the title to the underground rights.

The Mansabdar of the Totapalli estate admittedly transferred to the plaintiff's father in 1879 all his interest in the 27 villages. It was open to the plaintiff to show either that the interest of

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(1) (1920) L. R. 48 I. A. 56; I. L. R. 44 Mad. 421; 33 C. L. J. 280.

(2) (1874) L. R. 1 I. A. 282; 21 W. R. 358.

(3) (1919) I. L. R. 47 Calc. 95.

(4) (1912) L. R. 39 I. A. 202; I. L. R. 36 Bom. 639; 17 C. L. J. 17.

(5) (1870) 13 M. I. A. 333; 13 W. R. P. C. 21.

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the Mansabdar transferred in 1879 included the underground rights or that the plaintiff's father or he himself subsequently acquired them. In fact, in the first instance, he framed his claim on the footing that the underground rights passed to his father in or about 1883 by reason of the Government having at that time resumed the villages and enfranchised them in favour of his father.

This point is raised by para. 3 of the plaintiff's filed plaint in the following terms :—

"The plaintiff is the owner of Nellipudi, Meraka Chamavaram and some other villages in the Totapalli estate as per the plaint schedule. The underground rights in the said villages had become absolutely vested in and been enjoyed by the plaintiff and his predecessors in title and the said villages were purchased from the then Mansabdar by plaintiff's father in or about 1879. They were subsequently resumed by Government and enfranchised in plaintiff's father's favour and quit rent imposed on them."

As will be seen from the succeeding narrative, the plaintiff subsequently changed his ground more than once.

On the 18th December, 1916, the District Munsiff pronounced judgment in the plaintiff's favour so far as his title to the underground rights was concerned, and gave him a declaration accordingly, but did not grant him any injunction and rejected his claim for a refund of the royalties or penalties which had in fact been paid not by him but by his tenants.

The District Munsiff appears to have held that the alleged enfranchisement did not enlarge the appellant's rights but that the title to the Totapalli estate rested upon an ancient grant, which had not been produced, and that by virtue of a general rule to the effect that the grantor must in the absence of evidence to the contrary be taken to have parted with all his rights, the underground rights had passed by the grant and were therefore vested in the plaintiff.

An appeal was taken to the Subordinate Judge who, on the 17th December, 1917, also pronounced judgment in the plaintiff's favour. He appears to have held, that there was an original service grant of the estate which must be presumed to have carried the underground rights and further that the plaintiff was entitled to the underground rights by virtue of the alleged enfranchisement. He therefore confirmed the decree of the lower Court with the addition of an injunction to which he considered the plaintiff entitled.

The defendant appealed to the High Court of Judicature at Madras. On the 7th March, 1919, the Court set aside the decisions of the lower Courts. It remanded the suit to the District Munsiff for readmission and retrial, and directed the trial of an additional issue, namely :—"Whether the suit village in the hands of the plaintiff's predecessors was subject to a burden of service or was in lieu of wages for service?"

From the judgments delivered in the High Court it appears that the Court took the view that the Subordinate Judge had decided the case upon the basis that there had been an enfranchisement by the Government which carried the underground rights to the plaintiff's father, but that in fact what had taken place had not amounted to an enfranchisement at all. The learned Judges however directed the trial of the further issue because the plaintiff's counsel had presented to them an argument to the effect that apart from the alleged enfranchisement his client's predecessors in title had always held the estate subject to a burden of service and not merely in lieu of wages for service. This fact, if established, would (he had contended) lend strength to the plaintiff's claim to the underground rights. The suit was accordingly re-tried by the District Munsiff. On the 21st June, 1920, he again gave judgment in the plaintiff's favour, holding that the Totapalli estate was held only burdened with service and was not held in lieu of wages for service, and that the underground rights were therefore in the plaintiff. The District Munsiff's view seems to have been that the holding of the villages was first, and the imposing of the burden of service subsequent.

On appeal the Subordinate Judge, on 11th December, 1921, confirmed the District Munsiff, holding that the estate was enjoyed under a grant from the Zamindar of Peddapur, subject to the obligation of rendering some service and paying a quit rent, and that such a grant carried the underground rights.

The suit was again taken by the defendant to the High Court of Judicature at Madras. The appeal was, on the 31st March, 1925, allowed, the learned Judges holding that in the absence of any evidence that the underground rights were included in the grant they could not be treated as having thereby passed.

It is to be observed that in the High Court on the second appeal the plaintiff for the first time put forward a new contention that the Mansabdar of the Totapalli estate was originally a chief in a position analogous to a Poligar in the South of the Presidency, and as such entitled to the underground rights. This contention

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was rejected by the learned Judges of the High Court on the grounds that it had not been raised in the lower Courts and that there was no evidence to show any similarity between the tenure of the Totapalli estate and that of an estate held by a Poligar.

It is against this judgment that the plaintiff now appeals.

The history of the Totapalli estate prior to the early part of the 19th century is not free from obscurity. No grant of the estate has been produced. The material placed before the lower Courts consisted of (a) Mr. James Grant's Political Survey of the Northern Circars, written about 1785 and annexed to the Fifth Report of the Select Committee on the Affairs of the East India Co.; (b) Morris's account of the Godaveri District, published in 1868 under Government authority; (c) "The Godaveri Gazetteer" a Government publication of 1907; (d) the Government documents relating to the transactions of 1881-1883, which are printed at pp. 89-100 of the record; and (e) the extracts from the statement of a former Mansabdar of Totapalli printed in 13 Moo. I. A., p. 333, in the course of the reports of the case of *Strer Rajah Yanumula Venkayamah v. Strer Rajah Yanumula Boochia Vankondora* (1)

From this material certain facts emerge as to which there is no dispute, namely, (1) that in or about the year 1785 the Mansabdar was paying a fixed annual sum to the Zamindar of Peddapur and was under an obligation to furnish him with a military force of 700 peons when called upon to do so; (2) that some time prior to the end of the 18th century the Zamindar resumed certain villages forming part of the estate to satisfy his claims in respect of the annual sum; (3) that in 1808 there was a permanent settlement by the Government of Madras of the Zamindari of Peddapur and that the annual sum receivable by the Zamindar from Totapalli was treated as an asset of the Zamindar; (4) that in 1847 the Government of Madras acquired the Zamindari of Peddapur at a sale for arrears of revenue; (5) that in 1859 the Government commuted the obligation of the Mansabdar of Totapalli to supply 700 peons for an annual payment of 6,500 rupees; (6) that the Mansabdar from time to time alienated certain other parts of the Totapalli estate as well as the 27 villages alienated to the plaintiff's father in 1879; and (7) that the Government's documents show that the Government regarded the Totapalli estate as a service ~~estate~~ and dealt with it on that footing in 1881 to 1883 by making a settlement in respect of it which was expressly stated not to amount to a permanent settlement or enfranchisement.

(1) (1879) 13 M. I. A. 333.

Mr. Grant, in his survey of 1785, describes Totapalli as a small hilly country and a region of tigers. The obscurity of its early history may in part be due to its lack of importance.

At any rate their Lordships are of opinion that there is a definite finding by the Subordinate Judge to the effect that the estate was originally held under a grant from the Zamindar of Peddapur subject to a fixed annual rent and an obligation to provide a military force. After an examination of the materials placed before the lower Courts (in the course of which their Lordships saw a full copy of the statement of the Mansabdar, extracts from which are printed in 13 Moore's Indian Appeals, p. 333), their Lordships are of opinion that there was before the Subordinate Judge evidence upon which his finding of fact could have been based.

Before their Lordships for the first time it has been urged by the plaintiff that the Mansabdars of Totapalli were originally independent chieftains not taking under any grant at all, and that the findings of fact arrived at by the Subordinate Judge should be reviewed and modified accordingly.

In their Lordships' opinion they have no jurisdiction in the circumstances of this case to embark upon any such review. Under the Civil Procedure Code no second appeal will lie except on the grounds specified in Section 100. Directly in point are the observations of Lord Macnaghten in *Mussumat Durga Choudrain v. Jauahar Singh Choudhri* (1) in which he says :—

"It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be."

There remains then only the question whether the High Court of Judicature at Madras was right in holding that the underground rights did not pass in the absence of evidence of the inclusion of such rights in the grant found by the Subordinate Judge.

There was, in fact, no evidence that the grant included the underground rights or that the minerals had ever been worked by the Mansabdars of Totapalli or by any of their alienees. The fact that minerals were in terms reserved in leases to tenants granted by the plaintiff and his father cannot in their Lordships' opinion be evidence that the underground rights passed from the Zamindar of Peddapur under the original grant to the Mansabdar of Totapalli.

(1) (1890) L. R. 17 I. A. 122 (127) ; I. L. R. 18 Calc. 23 (30).

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The lower Courts based their conclusion that the underground rights passed by the original grant upon a presumption that in the absence of any evidence as to the terms of the grant the grantor passed all that he had to the grantees.

In their Lordships' opinion no such presumption is admissible. Such a presumption would be contrary to many decisions of their Lordships' Board in which it has been from time to time pointed out that the rules of English law as to real property in England can afford no guidance as to what has passed under an Indian grant.

The principle to be applied to the present case is in their Lordships' judgment to be found stated by Lord Buckmaster in *Sashi Bhushan Misra v. Jyoti Prashad Singh Deo* (1), where, referring to earlier decisions, he says :—

"These decisions therefore have laid down a principle which applies to and concludes the present dispute. They establish that when a grant is made by a Zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

In the result therefore their Lordships are of opinion that the judgment of the High Court at Madras was right and that the appeal fails and ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

Douglas, Grant & Dold : Solicitors for the Appellant.

Solicitors, India Office : Solicitors for the Respondent.

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Appeal dismissed.

(1) (1916) L. R. 44 I. A. 46 (53).

PRESENT : *Lord Shaw, Lord Temlin and Sir Lancelot Sanderson.*

FAIZULLAH KHAN AND ANOTHER

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MAULADAD KHAN AND OTHERS.

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[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF THE NORTH-WEST FRONTIER PROVINCE.]

Court-fee—Court-Fees Act (VIII of 1870), Sec. 7, sub-sec.(4)—Suit for partnership accounts—Court-fee on memorandum of appeal—Civil Procedure Code, (Act V of 1908), Sec. 149—Court's discretion to allow payment of deficient court-fee on appeal—Effect of such payment—Memorandum of appeal not a nullity because insufficiently stamped—Limitation—Defect cured upon payment of deficient duty.

In a suit for partnership accounts, valued at Rs. 3000 for the purposes of court-fee, the plaintiffs asked for a rendering of accounts and a decree for Rs. 3000 with the statement that "if more than Rs. 3000 be found due to the plaintiffs they will pay an additional court-fee." The Trial Court by its final decree declared that Rs. 19,991, were due to the defendants, by the plaintiffs. No sum was found due to the plaintiffs under their claim for Rs. 3000. The plaintiffs appealed against the decree, praying for a reversal of the decree against them and for granting a decree in their favour for such amount as may be found due. They valued the appeal, for purposes of court-fees, at Rs. 19,991, and paid a court-fee of Rs. 975 due thereon :

Held, that the memorandum of appeal complied with the requirements of the Court-Fees Act, 1870, section 7, sub-sec.(4), in stating the amount at which the relief sought was valued.

Held, further, that the payment of Rs. 975 as court-fee sufficiently covered the appeal as a whole, including Rs. 19,991 (the amount of the decree passed against the appellants) on the one hand and a much smaller figure of Rs. 3000 (being the amount of the appellants' own claim) on the other. The plaintiffs' appeal was accordingly correctly stamped so as to cover all the relief sought, including their prayer that a decree for Rs. 3000 or less or more should be granted in their favour.

Assuming that the court-fee paid on the memorandum of appeal was inadequate, this was pre-eminently a case for the exercise of the Court's discretion under section 149, Civil procedure Code, 1908.

Where the court-fee paid on a memorandum of appeal is insufficient in amount, the Court may in the exercise of its discretion under section 149, Civil Procedure Code, 1908, give an opportunity to the appellant to add to the amount already lodged the extra sum required to make up the deficiency. The discretion conferred on a Court by this section extends to the whole or any part of any fee prescribed and can be exercised at any stage in the case, and, upon the extra payment being made, the document is to have the same effect as if it had been paid in the first instance.

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A memorandum of appeal duly presented within time and accepted by the Court is not a nullity merely because an inadequate court-fee has in the first instance been paid thereon. Upon payment of the deficient fee, the memorandum of appeal stands good from its date, and the appeal is not time-barred, (vide the concluding words of section 149 of the Civil Procedure Code).

Consolidated Appeals Nos. 19 and 20 of 1928 by the Plaintiffs, against an order dated the 7th May, 1925, of the Court of the Judicial Commissioner of the North-West Frontier Province, Peshawar (*Colonel J. Frizelle*), setting aside a decree dated the 24th March, 1924, of the Court of the Honorary Subordinate Judge, First Class, Dera Ismail Khan.

The material facts of the case appear sufficiently from their Lordships' judgment,

DeGruyther, K. C. and *Parikh* for the Appellants.

Schiller, K. C. and *Wallach* for the Respondents.

DeGruyther, K. C.: Section 149, Civil Procedure Code, 1908, applies to the case. The appellants are willing to make up the deficiency, if any, in court-fee.

(*Sir Lancelot Sanderson*: The application for payment of the extra court-fee should be made at the date of the hearing of the appeal),

(*Lord Shaw*: The Crown can never be deprived of the proper court-fee. It can always demand the right sum; see section 11, Court-Fees Act).

Presentation of the appeal to the proper officer of the Court, stops limitation running: Order 41, rule 9, Civil Procedure Code.

(*Lord Tomlin*: Under section 11 of the Court-Fees Act, the plaintiffs would have to pay the full court-fee on all the reliefs they get).

Parikh, follows.

Schiller, K. C. for the Respondents: The Judicial Commissioner was right in holding that the appellants were entitled to a remand only as to the amounts of their claim on appeal on which they had paid court-fees.

(*Lord Shaw*: In any event, the Government is not going to suffer),

(*Lord Tomlin* refers to section 6 of the Court-Fees Act. In section 7, the amount of the fee is to be computed, in suits for accounts, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If, therefore, the appellant values the relief in the memorandum of appeal and

pays a fee thereon, that is the amount of fee properly payable. Of course, if the appellant recovers more, he pays the extra fee under section 11 of the Act. But you cannot complain that the amount valued in the memorandum of appeal is not the proper amount).

(*Lord Tomlin* : In suits for accounts, it is impossible to say at the outset what the exact amount the plaintiff will recover. The Legislature therefore leaves it open to him to estimate the amount. That is the scheme of the Act).

(*Sir Lancelot Sanderson* : In all cases the plaintiff shall state the amount at which he values the relief sought ; see section 7, sub-sec-(4) of the Court-Fees Act. It is apparently left to him to fix the amount).

Their Lordships' judgment was delivered by

Lord Shaw : This is a consolidated appeal from an order dated the 7th May, 1925, in the Court of the Judicial Commissioner of the North-West Frontier Province, Peshawar, which set aside a decree of the Honorary Subordinate Judge of Dera Ismail Khan dated the 24th March, 1924.

Stated generally, the case between the parties had reference to the rendering of accounts and the settlement of the sums due thereon in connection with a partnership of a firm of contractors for supply and transport and military works. The partnership is now dissolved.

In the suit, brought on the 29th March, 1923, Faizullah Khan and Sherdad Khan, plaintiffs and appellants, valued their suit at Rs. 3,000 for the purpose of Court fees, and asked for a rendering of accounts and a decree for Rs. 3,000, with the statement " if more than Rs. 3,000 be found due to the plaintiffs they will pay an additional Court fee." In his pleas, Mauládad Khan, the first defendant, asked for a decree in his own favour for Rs. 29,000, and he challenged the shares as given by the plaintiffs and asked for dismissal of their suit. As stated in the appellants' case :—

6. The suit was tried by the Honorary Subordinate Judge, First Class, Dera Ismail Khan, who on the 22nd October, 1923, passed a preliminary decree determining the respective shares of the parties in the partnership, and ordering accounts to be taken according to the directions given by him. There was no appeal against this decree which has therefore become binding on the parties.

On the 24th March, 1924, the Honorary Subordinate Judge passed a final decree with costs and interest. Under that decree

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Rs. 19,991 were declared to be due to Mauladad Khan, the first defendant, by plaintiffs-appellants. No sum was found due to the appellants under their claim for Rs. 3,000.

The judgment was appealed from by both parties. The position of the plaintiffs still remained the same, namely, that they challenged the decree against them for over Rs. 19,000 and maintained that that sum in whole or in part should be disallowed, and that their own claim of Rs. 3,000 or less or more should be granted in their favour. It is plain that any substantial inversion of liability under the respective decrees would result in all likelihood in the sums awarded on appeal to both parties being much within 19,000 rupees awarded to one. In these circumstances the appeal was taken, and the claim in the appeal to the Court of the Judicial Commissioner was expressly as follows :—

“Claim in Appeal.—For reversal of the decree against the appellants and for granting a decree in their favour for such amount as may be found due. Value for purposes of Court fee of Appeal, Rs. 19,991.”

This appeal was duly received and the copy of the office endorsement upon it states : “Presented by Lala Sham Das, agent of appellants. Is within time. The Court fee is correct and necessary copies are attached.”

It is only necessary to observe that this applied to a valuation of the appeal in its entirety, that is to say, both for the purpose of reversing the decree against the appellants and for granting the decree in their favour.

The Court fee due upon the appeal valued as an entirety as thus stated was Rs. 975, and that was duly paid.

Their Lordships find no reason for treating that payment either as upon an under value or a split value. Their Lordships think, with much respect to the Judicial Commissioner, that it was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the appellants. That amount, as already stated, may be not only in full but largely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach and it covered the appeal as a whole, including that sum on the one hand and a much smaller figure of Rs. 3,000 on the other.

Their Lordships are clearly of opinion that the memorandum of appeal in the present case did state in terms of the Act the amount at which the relief was sought. This determines the appeal.

A reference may be added to the results which would have followed from the course adopted below.

The Judicial Commissioner found that a remand should only be granted as to the Rs. 19,000. The result of this would be that although accounts were taken on the remand and the Rs. 19,000 was largely reduced and the sum of Rs. 3,000 or more or less than that sum were found due to the plaintiffs, no remedy could be granted for the latter event because according to the judgment only a sectional and not a fee covering all the relief sought had been paid, and therefore one item and claim for Rs. 3000 had finally dropped out of the case. The learned counsel for the respondents frankly argued the case on this footing, declaring that the appeal in so far as it could be held to refer to the Rs. 3,000 had gone, and must be dismissed as a nullity. For the reasons stated, their Lordships cannot accept this argument; the extraordinary consequences figured accordingly do not arise. But upon a second point—an important point of procedure—their Lordships think it right to add the following:—Granted that a fee had been paid which was insufficient in amount what was the duty of the Court?

In such a case as the present it appears to be pre-eminently one for the exercise by the judicial authority of the discretion for giving an opportunity to add to the amount lodged the extra 70 or 80 rupees required or for deferring the question of the amount of fee under the Court Fees Act until final value was ascertained. The provisions of the Court Fees Act which are in place (Act 7 of 1870), Section 7, head (iv) (f) for "accounts," . . . "according to the amount at which the relief sought, is valued in the plaint or memorandum of appeal." *Even accordingly if the mistake insisted on had been made, this, in the opinion of the Board, was a plain case for rectifying that situation if it could be done, and the Courts are fortunately furnished with an easy method of doing so. (Section 149 C. C. P.):—

"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to Court fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such Court fee; and upon such payment the document in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

It will be observed that that discretion extends to the whole

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or any part of any fee prescribed and can be exercised at any stage in the case, while finally, upon the extra payment being made, then the document is to have the same effect as if it had been paid in the first instance.

This also answers the argument presented under the Limitation Act. The dates are as follows:—The decree of the Subordinate Judge was dated the 24th March, 1924, the first appeal was on the 27th May and the second on the 2nd June, bringing before the appeal Court the respective claims of each suitor. The time for limitation of the appeal is 90 days, and it is thus seen that both appeals were within time. They were not a nullity. On the contrary, they were documents duly presented to and accepted by the Court, and as to the fee thereon, should the valuation be unsatisfactory or in the end insufficient, that is validated by the additional payment, the result of which payment is that the document, namely, the memorandum of appeal, stands good from its date. The appeals are accordingly not time barred.

Their Lordships will humbly advise His Majesty to allow this appeal, to set aside the order of the Judicial Commissioner dated the 7th May, 1925, and to remit the case to the Court of the Subordinate Judge for a fresh trial and decision on the merits. The appellants will have the costs incurred in the Court of the Judicial Commissioner and of this appeal. The costs incurred in the Court of the Subordinate Judge will abide the result of the new trial.

Johnson & Allen : Solicitors for the Appellants.

Wilson & Co : Solicitors for the Respondents.

K. J. R.

Appeal allowed.

PRESENT: *The Lord Chancellor, Lord Carson and
Sir Charles Sargent.*

VALLABHDAS NARANJI, KHOT OF KANJUR.

v.

THE DEVELOPMENT OFFICER, BANDRA.

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April, 16.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Compensation—Buildings erected on the land of another—English Law inapplicable—Option of owner of soil to require removal of materials or to pay compensation for the building—Land Acquisition Act (I of 1894)—Government entering into possession before issue of notification—Award of compensation for such occupation—Question of mere valuation—Non-interference by Privy Council.

The English Law as comprised in the maxim, "*quicquid plantatur solo, solo cedit*", has no application in India.

There is no absolute rule of law in India that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself.

Buildings erected on the land of another do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil. If he who builds on another's land is not a mere trespasser, but is in possession under any *bona fide* title or claim or colour of title, he is entitled either to remove the materials, or to obtain compensation for the value of the building, at the option of the owner of the land: Case-law discussed.

Where Government entered into possession before the land was actually notified for acquisition under the Land Acquisition Act, 1894:

Held, that the justice of the case was amply met by awarding to the owner of the land (as compensation for such occupation) interest on the value of the land computed from the date when the Government so took possession.

Where the question as to the proper amount to be awarded as compensation for land acquired under the Land Acquisition Act is one of mere valuation and no question of principle is involved, the Privy Council will, in accordance with their usual practice, decline to interfere with the decision of the Court of Appeal in India.

Appeal No. 119 of 1927 by the Claimant from a decree made on the 24th February 1926 by the High Court, Bombay (*McLeod C. J. and Coyajee J.*), varying an award made on the 28th July, 1924, by the Assistant Judge of Thana, on a reference made under section 18 of the Land Acquisition Act, 1894.

The material facts of the case appear sufficiently from their Lordships' judgment.

Upheld K. C. and *Reiter* for the Appellant.

Lawrence K. C. and *K. Brown* for the Respondent.

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Uppohn, K. C. : Refers to the Land Acquisition Act, section 3, (definition of "land"), and section 23 (as to market value).

As to the principle on which compensation is assessed when land is taken under compulsory powers, see *In Re Lucas and Chesterfield Gas and Water Board (1)*.

On the crucial date, i. e., when the Government issued its declaration to acquire the land, the appellant was the owner of the buildings erected on the land. The Government had no right to take possession until the award was made by the Collector; section 16 of the Act. In section 34 provision is made for payment of interest.

Lowndes, K. C. for the Respondent : An issue was raised whether the appellant was entitled to extra compensation by reason of Government having taken possession prior to the Notification, and the Courts awarded him compensation from that date in the shape of interest.

Under section 23 of the Act the Court awards compensation, not market value, though market value is one of the factors to be taken into consideration. The whole scheme of the Act is that compensation is awarded, (vide the Preamble and the various sections of the Act which refer to compensation and compensation alone, and not to market value.)

In addition to the cases cited at the Bar and referred to in their Lordships' judgment, the following decision was also mentioned during the course of the argument :—*Frenchman v. Assistant Collector, Haveli (2)*.

Their Lordships' judgment was delivered by

Lord Carson :—This is an appeal against a decree made on the 24th February, 1926, by the High Court of Judicature at Bombay, varying an award dated the 28th July, 1924, by the Assistant Judge at Thana on a reference made under Section 18 of The Land Acquisition Act, 1894. The land in question is part of the village of Kanjur, and the area in dispute in this appeal is stated to be about 26¾ acres. Some of the lands were in the possession of *sutidars* who had rights of permanent occupancy in their rice fields. The first question which was argued before this Board on the present appeal was the claim of the appellants that certain buildings which had been erected by the Government on the land at the date of the Government's declaration of the 4th November, 1920, under the Sixth section of the Land Acquisition Act had become and were the appellant's property, and that he

(1) (1909) 1 K. B. 16.

(2) (1912) 24 Bom. L. R. 782.

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should be allowed the value of the land in the state in which it then was; that is to say, with the buildings on it. The way that question has arisen is as follows:—

It appears that in 1919 the Government resolved to acquire the land in question and other land under the said Act, and by arrangement with certain of the *sutidars* they took possession of such land, including a portion which was in the occupation and the property of the appellant. Upon such land, including a portion in the possession of the appellant, they proceeded to erect certain buildings without the necessary notification, which was not served until the 4th November, 1920, when the Government notified, under the Land Acquisition Act, Section 6, a declaration that 52 acres more particularly described therein, situated in the said village and including the land in question in this appeal, were needed for a public purpose, and the Collector took order for the acquisition thereof. It is to be observed that the Government were in a position by law at any moment to regularise their position by such a notification—a fact which becomes material when it has to be considered what the nature of their trespass was under the law as applicable on the question of the right of the appellants to have the buildings which were erected on the lands before the 4th November included in the valuation. The Assistant Judge held that the appellant was not entitled to have the said buildings erected by the Government included in the valuation, but that he was entitled to compensation for the occupation of the land by the officials before the notification of the 4th November, 1920, and he awarded such compensation in the form of interest on the value of the land computed from the date when the Government took possession. On appeal to the High Court of Appeal at Bombay that Court confirmed on this point the judgment of the Assistant Judge and refused to allow the value of the building to be considered in assessing the amount of compensation to be paid to the appellant. In the course of his judgment the learned Chief Justice said: "It is curious to have to remark that Government entered upon this area before the land was actually notified for acquisition. They seem to have done so in the belief that they could get the consent of the occupants to such possession. They not only took possession, but erected buildings on the land." The learned Chief Justice, however, held that the question was decided by the principles laid down in the case of *Premji Jivan Bhats v. Cassum Juma Ahmed* (1), and he quoted from the judgment of Sargeant,

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(1) (1895) L. L. R. 20 Bom. 298.

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C. J., in that case as follows :—"It is well-established law in England that if a stranger builds on the land of another, although believing it to be his, the owner is entitled to recover the land with the building on it unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land. This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building." Now up to a certain point there was no difference between Counsel for the parties as to the law applicable to the case. It was agreed on both sides that the English law as comprised in the maxim, "*quicquid plantatur solo solo cedit*," has no application. In 1866, in consequence of a difference of opinion between certain divisions of the Courts, the law was carefully reviewed in a case referred to a Full Bench, *Thakoor Chunder Poramanick v. Ramdhone Bhattacharjee* (1). In the order of reference it is stated that the question involved was "whether a person who, being in possession of land as proprietor, erects *puhha* buildings (of brick, etc.) thereon, has a right, on being subsequently ejected from the land as having no title, to pull down those buildings and remove the materials. In the present case, we decided that he has no such right. Since we so decided, it appears that another Division Bench have, in the case of *Gobind Poramanick v. Gooroo Churn Dutt* (2), decided to the contrary effect." The judgment was given by Sir Barnes Peacock, C. J., who stated as follows :—

"We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself."

And later on he adds :—

"We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the

(1) (1866) 6 W. R. 228; B. L. R. Sup. 595. (2) (1865) 3 W. R. 71.

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owner of the soil,—the option of taking to the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

The question is, what is meant by a "mere trespasser" as contradistinguished from possession under "any *bona fide* title or claim of title." In the case quoted the defendant had erected buildings on land sold to his predecessors in title by a widow during the lifetime of the widow, but which sale was held void as being improperly made by the widow, and it is to be noted that the case reported in *Sutherland's Weekly Reporter*, and referred to in the reference, was in no way overruled. It is therefore worth while to consider the view taken by the learned Judges in that case, who stated the law as follows: "But, in the present case, we have a trespasser who has tortiously entered upon the land of another and built a house thereon. Without going so far as to say under no circumstances could acquiescence by the party injured in the act of the injury done, be inferred, we are clearly of opinion that no such acquiescence was either pleaded or proved in the present case. We, therefore, think the plaintiff is clearly entitled as against the defendant, a trespasser, to possession of his land, leaving the defendant at liberty to remove the bricks of his house."

Again, in *Narayan bin Raghaji v. Bhelagiri Guru Mangir* (1) and other cases, where H., knowing that B. claimed certain land as his own, nevertheless purchased the land from a third person and erected a bungalow thereon, which B. did not interfere to prevent. Couch, C. J., in giving judgment, said, "H. took the risk, and as he was informed of B's claim it was not necessary for the latter to give a notice. We cannot, however, apply to cases arising in India the doctrine of the English law as to buildings, viz., that they should belong to the owner of the land. The only doctrine which we can apply is the doctrine established in India that the party so building on another's land should be allowed to remove the materials."

In the recent case before this Board *Narayan Das Khattri v. Jatindra Nath Roy Chowdhury* (2), the statement first quoted from the judgment of Sir Barnes Peacock was cited with approval, and it was added that such statement "seems to have been accepted for many years as a correct pronouncement."

It was contended, however, on behalf of the appellant that in

(1) (1865) 6 Bom. H. C. R. 80. (2) (1927) L. R. 54 I. A. 218; 46 C. L. J. 1.

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the various cases relied upon there was at least some genuine claim or belief in the party erecting the buildings that he had a title to do so, even though he was eventually held to be a trespasser; and it was urged that no such claim or belief existed in the present case, in which it was said the Government, without any pretence of right, tortiously invaded the appellant's property and proceeded to deal with it as their own. The learned Counsel for the respondents, whilst contending that such was not the true state of facts, and that the respondents could not be considered mere trespassers, was prepared to argue that, even if it were so, once it was admitted that the English maxim did not apply, the logical consequence followed that in any case of trespass by building on the lands of another, such trespasser had a right to remove the structure or be paid the value thereof by the owner, and he relied upon the fact that no case drawing a distinction in the nature, or degree of the trespass could be found. Their Lordships, however, do not think it necessary to give a decision upon this far-reaching contention. They agree with what was apparently the view of both Courts in India that under the circumstances of this case, as already set forth, by the law of India, which they appear to have correctly interpreted, the Government officials were in possession "not as mere trespassers" but under such a colour of title that the buildings erected by them on the land ought not to be included in the valuation as having become the property of the landowner. They considered, and their Lordships agree, that the justice of the case was met by holding that the appellant was entitled to compensation for the occupation of the lands by the officials before the notification of the 4th November, 1920, which, as before stated, was awarded in the form of interest on the value of the land computed from the 27th November, 1919, the date when the Government took possession. This method of compensation has not been questioned by the respondents.

The case of *The Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Company* (1) was referred to in the course of the argument to support a claim that at all events the appellants had at the crucial date a right to call upon the respondents to remove the buildings, and that they were entitled to be paid for their land with such a right attaching to it. Whether that case applies or whether such a right would be of any value, their Lordships do not think it necessary to decide, as it is admitted that no

(1) (1900-01) L. R. 28 I. A. 121.

such claim was put forward before either of the Courts in India. Their Lordships must hold, therefore, that the Courts below were right in disallowing the claim of the appellants in respect of buildings, and on this point the appeal fails.

The appellant has also appealed against so much of the judgment of the High Court as reduced the value placed upon the land by the District Judge. The main contentions were (1) that as the land had admittedly potentialities as building land the High Court had not the evidence before it to reduce the estimate made by the District Judge, and in fact ignored the evidence upon this point, and (2) that the District Judge, when he dealt with the transaction relating to a plot of the land, Survey No. 170, containing 16,000 square yards, and sold in the month of April, 1920, at 8 annas per square yard, was right in accepting this transaction as a reasonable guide to the value of all the land in question, on the ground that this plot was not so favourably situate as the bulk of the land. The High Court has very fully dealt with these considerations and given their reasons for not being able to accept the conclusions at which the District Judge had arrived.

Their Lordships are unable to find any principle involved which could lead them to say that the High Court were wrong in arriving at the decision to which they have come, and as the questions involved are ones of valuation and not of principle, their Lordships, in accordance with the usual practice of this Board, must decline to speculate as to the proper amount to be awarded under such circumstances.

The appeal upon this point accordingly fails.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Ranken, Ford & Chester : Solicitors for the Appellant.

India Office : Solicitors for the Respondents.

K. J. R.

Appeal dismissed.

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PRESENT : *Lord Blanesburgh, Lord Tomlin and
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April, 19.

MUSAMMAT JAGGO BAI

v.

UTSAVA LAL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT ALLAHABAD].

Limitation—Limitation Act (IX of 1908), Sch. I. Arts. 120, 141—Suit by reversioner for declaration—Subsequent suit for possession after the death of widow—Causes of action, distinct—Reliefs, different—Civil Procedure Code (Act V of 1908), O. 2 R. 2—Suit for Malikana—Grant of certificate under The Pensions Act (XXIII of 1871)—Right of action as regards Malikana—Time, running of—Decree obtained against widow, effect on reversioner—No decree against widow—Adverse possession against widow.

At the time when A died on the 30th October, 1875, there were living his daughter, the plaintiff, his mother, his widow (plaintiff's mother, hereinafter called mother) and his brother's widow (plaintiff's aunt, hereinafter called aunt). The estate of A. included several villages, an 8 annas share in the village of P—the other 8 annas share was owned by D—and a house at W.

After A's death the aunt got possession to the exclusion of the mother (of the plaintiff), of some of the villages or of a half share therein and also of the house at W.

By a document dated the 10th September 1880, D, the mother and the aunt affected to release the village of P to the Government in return for a perpetual *Malikana* of Rs. 2000, one half of which represented the share of A's estate in the village and the other half of which represented the share of D.

By a sale deed dated the 6th October, 1880, D made over Rs. 500, representing one-half of her share in the *Malikana* to the mother and aunt in satisfaction of his indebtedness to A's estate. Thereafter the mother and the aunt received payment of the *Malikana* of Rs. 1500 in equal moieties.

In 1886 the mother instituted a suit against the aunt, seeking to establish her title as an heir to A to the villages, or share of villages, in the aunt's possession, and to dispossess the aunt therefrom and to establish her title to the whole of the *Malikana* of Rs. 1500. No reference was made in the plaint to the house at W. She obtained judgment in her favour in July 1894 in respect of the villages, but the Court held that in the absence of a certificate under the Pensions Act, 1871. It was not competent to deal with the *Malikana*. The effect of it was that the mother recovered possession of all the villages, but the aunt continued to receive one-half of the *Malikana* of Rs. 1500 and remained in possession of the house at W.

In 1890, the plaintiff instituted a suit against the mother and the aunt, seeking to establish her title as reversionary heir of A, subject to the mother's interest as widow to the immoveable property of A mentioned in the plaint, including the

villages of which, or of a share of which, the aunt had possession. The plaintiff also sought to have a document dated the 9th October, 1877, purporting to be an arbitration award on which the aunt relied, declared invalid. The plaint referred to the village of P, but contained no reference to the house at W. In January, 1894, she obtained a decree in which it was stated that she was entitled to succeed to the property in dispute on the mother's death, and that on the mother's death the arbitration award of the 9th October, 1877, and other proceedings by which the aunt had become possessed of the property in dispute would be void as against the plaintiff.

In February, 1914, the mother died, and therefore, the plaintiff succeeded to the property, possession of which had been recovered from the aunt.

The aunt died on the 20th June, 1920, having by her will, dated the 3rd July, 1919, affected to dispose in favour of her nephew, the defendant, of the share of the *malikana* which she was receiving and of the house at W.

On the 15th December, 1920, the plaintiff having first obtained the necessary certificate under the Pensions Act, 1871, instituted the present suit and asked *inter alia* for the following relief:—(a) That it might be declared that the alleged will of the aunt was invalid and unenforceable against the rights of the plaintiff, and that by means of it the defendant had not acquired any rights to get Rs. 750, the *Malikana* amount or any right in other property in respect of which the will had been made and (b) that the plaintiff might be put in possession of the *malikana* property and the house at W by dispossession of the defendant:

Held, that the plaintiff was not precluded by reason of rule 2 of order 2 of the Code of Civil Procedure from bringing a suit for possession of the house at W, though no claim was made in her previous suit against mother and aunt seeking to establish her title as heir, as the cause of action in the present suit was distinct from that in the previous suit and that as the present claim of the plaintiff could not have been made in the previous suit.

That having regard to the statement in the plaint and to the form of the relief sought therein, the suit, so far as the *Malikana* was concerned being not a suit for possession, was not governed by Article 141 but by Article 130, Schedule I of the Limitation Act and that as less than 6 years had run between the grant of the certificate under the Pensions Act, 1871, and the institution of the present suit, the claim was not barred.

That there was no right of action at all in respect of *Malikana* unless and until a certificate under the Pensions Act, 1871, was obtained.

Where a decree founded upon the law of limitation is obtained against the widow in her lifetime the reversionary heir is barred and does not get the benefit of Article 141, Schedule I of the Limitation Act: *Shivaganga* case (1) and *Veithalinga Mudaliar v. Srinagath Anni* (2). But where there has been no decree or other act in the law in the widow's lifetime, though at the death of the widow, a stranger has been in adverse possession for 12 years or more, the heir is entitled, after the widow's death, to rely upon Article 141, Schedule I, of the

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(1) (1863) 9 Moo. I. A. 539.

(2) (1925) L. R. 52 I. A. 322; 42 C. L. J. 565.

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Limitation Act, for the purpose of the determination of the question whether the title is barred by lapse of time: *Ranckerdas v. Parvatisbai* (1).

The point as to the *Malikana* not being immoveable property being not taken in either of the Courts below, and each of the Courts below having treated the *Malikana* as immoveable and the defendant objector not being willing that there should be any remand of the case for further evidence, their Lordships of the Privy Council held that the point was not open.

Appeal No. 115 of 1927 by the Plaintiff, from a judgment and decree of the High Court, Allahabad (*Sir Grimwood Meares C. J.* and *Lindsay J.*), dated the 26th November, 1925, reversing a judgment and decree of the Court of the Subordinate Judge of Banda, dated the 19th May, 1922.

The material facts of the case are set forth in their Lordships' judgment.

The suit giving rise to the present appeal was brought by the appellant for a declaration that she was entitled to a certain *Malikana* and to eject the respondent (defendant) from a house. The main question for determination on the appeal to the Privy Council was, whether at the time of the suit the appellant had a subsisting title to the said two items?

Of the issues framed by the Subordinate Judge only the following are now material:—

(7) Was Mussamat Man Koer in adverse and proprietary possession of the *Malikana* allowance and the house at Warnagar in question for over 12 years?

(8) Is the suit barred by limitation?

The learned Subordinate Judge delivered judgment on the 19th May 1922, holding that though Man Koer had been in possession of the house at Warnagar and the *Malikana* allowance for more than 12 years, such possession was not adverse to the appellant (plainiff) who was a reversionary heir of Uttam Ram; that time began to run against the appellant only from 1914 when her mother died and as the suit was brought within 12 years from 1914 it was not barred by limitation. The learned Subordinate Judge concluded his judgment, on this part of the case, in the following terms:—"It has been repeatedly decided that possession taken by a trespasser during the lifetime of a Hindu widow or Hindu female with a life-interest is not adverse as against the reversioners until after the death of the widow, vide *Ganga v. Kankai Lal* (2).

The respondent (defendant) then appealed to the High Court

(1) (189) L. R. 26 I. A. 71; I. L. R. 23 Bom. 725.

(2) (1918) 17 All. L. J. 44.

at Allahabad and that Court delivered judgment on the 26th November 1925, in favour of the defendant-respondent and passed a decree dismissing the plaintiff's suit. The learned Judges held that Deo Koer, in her suit against Man Koer, fully represented her husband's estate and was not merely acting on her own behalf or in her personal interest; that Man Koer had been appropriating the *Malikana* from 1880 under an assertion of her own title against Uttam Ram's estate which Deo Koer represented; that adverse possession of the *Malikana* right by Man Koer began to run from 1880 if not earlier and as more than 12 years had expired since that time, the title of Deo Koer or her successor in interest had been extinguished by lapse of time and Man Koer had acquired a good title thereto. With regard to the house at Warnagar they held that though it had been admittedly in the possession of Man Koer it had never been claimed in any of the previous suits and therefore the title of the heirs of Uttam Ram to that also had been lost by prescription.

In the course of their judgment, the learned Judges of the High Court enunciated the law on the subject in the following words :—

"It is now well established that in cases where the widow represents the estate, adverse possession which begins to run against the widow will continue running and may defeat the claims of the reversioner whose title ripens after the widow's death."

DeGruyther K. C. and *Abdul Majid* for the Appellant.

Upjohn, K. C. and *Parikh* for the Respondent.

Arguments with regard to Art. 141, Limitation Act

and effect of adverse possession against widow,

DeGruyther, K. C. for the Plaintiff-Appellant urged that the possession of Man Koer even if adverse to Deo Koer who held the estate as Uttam Ram's widow was not adverse to the plaintiff-appellant who was a reversioner and cited *Srinath Kur v. Prosunno* (1); *Ramkali v. Kedar Nath* (2); *Cursandas Govindji v. Vundravandas Purshotam* (3) and *Venkataramayya v. Venkata-lakshnammu* (4), in support of the general proposition that possession adverse to the widow was not adverse to the reversionary heir. The Board in *Runchordas's* case (1), in substance affirmed the principle laid down in the above four cases. The decision in

(1) (1883) I. L. R. 9 Cal. 934 (F. B.). (2) (1892) I. L. R. 14 All. 156 (F. B.)

(3) (1885) I. L. R. 14 Bom. 481. (4) (1897) I. L. R. 20 Mad. 493.

(5) (1899) I. L. R. 26 I. A. 71; I. L. R. 23 Bom. 725.

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Vaithalinga Mudaliar's case (1), does not decide anything to the contrary. Refers to *Bankey Lal v. Raghunath Sahai* (2), where all the relevant decisions on the subject are discussed.

Lachhan Kumar v. Manorath Ram (3), is distinguishable. The Hindu widow there had merely a right to maintenance

As to the nature of a Hindu reversioner's right in the property which the female owner holds for her life, see *Amrit v. Gaya Singh* (4).

Limitation does not, under the present law, run against the reversioner until the death of the widow. The observations to the contrary were made in cases decided under the Limitation Act of 1859. The Act of 1871 altered the law: Mayne's Hindu Law, paras 642 and 643.

Upjohn, K. C. for the Defendant Respondent: The doctrine enunciated in *Shivagunga* case (5), is this, that a Hindu female heir, as being the person in whom the whole estate is vested for the time being, is a complete owner, and in her actings and omissions she is considered as representing the estate, and the result is that the person who is called a reversioner or next taker, when ascertained, is often bound by the acts of the female heiress, although he does not claim from her: See *Nobin Chunder v. Issur Chunder* (6), the judgment of Sir Barnes Peacock and his learned colleagues. Suppose there is no decree, but mere long adverse possession against the female heir, it was decided by Sir Barnes Peacock in the above case, *Nobin v. Issur*, (6) that it ought to have the same effect against the next heir as a decree against her.

(*Lord Blanesburgh*: It is rather hard on the reversioner to be barred, if the female lived for a great many years).

The female heiress represents the estate, and the reversioner has to take his chance whether the heiress is alert or not in asserting her rights: *Vaithalinga's* case (1), deals with this very point.

(*Lord Tomlin*: When you have a suit brought against a widow which results in an adverse verdict against her, that would bind the reversioner, but if there is no decree, then, however long the

(1) (1925) L. R. 52 I. A. 322; 42 C. L. J. 563. (2) (1928) 26 All. L. J. 1049.

(3) (1894) L. R. 22 I. A. 25; I. L. R. 22 Calc. 445.

(4) (1917) L. R. 45 I. A. 35; I. L. R. 45 Calc. 590; 27 C. L. J. 296.

(5) (1863) 9 Moo. L. A. 539.

(6) (1868) 9 W. R. 505 (F. B.); B. L. R. Sup. 1008.

adverse possession may be against her, it would be open to the reversioner to sue within 12 years of her death ; see Art. 141).

I rely on *Vaithialinga's* case (1). The Board there devoted several pages to the discussion of this question.

(*Sir Lancelot Sanderson* : The observations there were *obiter dicta*).

(*Sir Lancelot Sanderson* : Does Art. 141 imply that it is not to apply if the female is already barred by adverse possession ?).

(*Sir Lancelot Sanderson* : Mr. Mayne, in his *Hindu Law*, paragraph 643, says that the statute can *never* begin to run against a reversioner in consequence of any possession or dispossession of a female, so long as she holds as heir of the last male).

Refers to U. N. Mitra's *Law of Limitation*, Vol. 1, page 46, and Bengal Regulation II of 1805, and the first general Limitation Act, XIV of 1859, section 1, sub-section (12).

(*Lord Blanesburgh* : That sub-section is in effect Art. 144 of the present Act).

Refers to Art. 141 of the Limitation Act, 1877, and Mitra's *Law of Limitation*, Vol. II, page 1143.

(*Sir Lancelot Sanderson* : That Article is exactly the same as in the present Act).

Reads from the judgments in *Nabin Chunder's* case (2).

(*Lord Blanesburgh* : It was a decision under the Limitation Act of 1859).

There has been no change made in the law by the later Limitation Acts ; see the word "entitled" in Art. 141.

(*Lord Blanesburgh* : Mr. Mayne says in para 643 that that is not the proper construction under the later Acts of 1871 and 1877).

Refers to *Hurrinath Chatterji v. Mothoor Mohun* (3), and to the observations of Lord Watson during the course of the argument in that case. Sir R. Couch, in delivering judgment, said : "The words 'entitled to the possession of immovable property' (in Art. 141) refer to the then existing law.....The intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right."

These observations, if I may say so, hit the bird in the very eye.

(1) (1925) L. R. 52 I. A. 322 ; 42 C. L. J. 563.

(2) (1868) 9 W. R. 505 (F. B.).

(3) (1893) L. R. 20 I. A. 183 ; I. L. R. 21 Calc. 8.

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(*Lord Blanesburgh* : All that their Lordships laid down there was that if there is a decree against the widow, the reversioners cannot come in within 12 years of her death, but when there is no suit, and mere adverse possession, then, according to Mayne's Hindu Law, the reversioner has 12 years from her death under the new Limitation Act).

It would be very anomalous that the reversioner should be barred if there is a decree against the widow, and not barred if there is no decree.

(*Lord Tomlin* : *Nobin Chunder's case* (1), was the then existing law, and the question is, whether under the Act of 1871, a new right of action is given to the reversioner).

The word "entitled" in Art. 141 refers to the existing law : See *Hurminath Chatterjee's case* (2). When the widow herself is barred by adverse possession, the reversioner is also barred, as he would not be "entitled" to the possession.

(*Lord Blanesburgh* : You must admit that the Act of 1871 did make some alteration in the law. If there had been adverse possession for 10 years against the widow, it is quite clear that the reversioner would have 12 years from her death, although under the Act of 1859 he would have to come in within 2 years of her death).

(*Lord Blanesburgh* : The Act of 1871 would prevent the property from being transferred to the squatter until the lapse of 12 years from the death of the widow).

(*Lord Blanesburgh* : Under the Limitation Act of 1859 the reversioner had to take the estate as he found it. Do you suggest that the Act of 1871 did not alter the law ?).

Yes. In no other article of the Limitation Act do we find the description of a plaintiff as a "person entitled" to possession of property, except in Art. 141. My submission is that the later Acts of 1871, 1877 and 1908 have made no change in the law, and the Legislature in Article 141 has advisedly used language not to alter the old law.

Arguments with regard to malikana and limitation.

DeGruyther, K. C. for the Plaintiff-Appellant : The claim in respect of the *malikana* is not statute-barred. Refers to section 28, Limitation Act, and Articles 48, 49.

(*Lord Tomlin* : I think that section 28 covers the case of moveable property also).

(1) (1868) 9 W. R. 505 (F. B.) ; B. L. Sup. 1008.

(2) (1893) L. R. 20 I. A. 183 ; I. L. R. 21 Calc. 8.

Except under section 28, there can be no extinguishment of title.

There is no specific Article in the Limitation Act barring my right to the *malikana*. The only Article applicable to a declaratory suit is Article 120, which is a general provision.

(*Sir Lancelot Sanderson*, referring to the third column of Art. 120, "when the right to sue accrues," observed: If that Article applies, your suit for declaration is obviously time-barred).

I am not suing for a declaration.

(*Lord Tomlin*: Six years having elapsed between the death of the widow and the institution of your suit, if Art. 120 applies, you are out of time).

(*Lord Tomlin*: Even granting your contention that time did not run until the death of the widow, the suit for the declaration would still be barred by Art. 120).

It is not my case that Art. 120 applies.

(*Lord Blanesburgh*: Why not?).

(*Lord Tomlin*: Arts. 48, 49, relating to specific moveable property, cannot apply to *malikana*).

(*Sir Lancelot Sanderson*: *Malikana* means a right to receive money from Government. Surely it does not come within Arts. 48, 49).

(*Lord Blanesburgh*: If there is no other provision in the Act, we must fall back upon Art. 120).

Malikana being immoveable property, Art. 120 has no application.

(*Upjohn, K. C.*: Art. 120 does not exclude from its operation cases of immoveable property).

Refers to *Mullick Abdeel v. Muleka* (1), at page 1125, paragraph four, beginning, "A *malikana* right is the right to receive from the Government a sum of money."

(*Lord Blanesburgh*: The only point now under discussion is that of limitation. Is *malikana* immoveable property?).

(*Sir Lancelot Sanderson*: We are bound to give effect to the statute of limitation, even if it is not raised; see section 3).

(*Lord Tomlin*: It is the duty of the Court *suo motu* to see if the statute applies).

(*Sir Lancelot Sanderson*: If it is clear to this Tribunal that a particular Article of the Limitation Act applies, we are bound to give effect to the statute, even though both the parties in the Indian Courts have assumed that a wrong Article applies).

(1) (1884) I. L. R. 10 Calc. 1112.

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Yes, if the facts on the record are clear, the Court may take notice of the statute of limitation and give effect to the appropriate Article. The main question here is, whether *malikana* is moveable or immoveable property).

(*Lord Blanesburgh* : The term of 12 years is applicable only in the case of immoveable property).

Refers to U. N. Mitra's Law of Limitation, Vol. 1, page 279, as to "immoveable property." and the definition of the expression in the General Clauses Act.

Upjohn, K. C. for the Respondent-Defendant : Art. 141 does not apply to the claim for *malikana*. Under section 3 of the Limitation Act it is the duty of the Court to find out the particular cause of action, and if it comes within the Act, it is obligatory upon the Court to dismiss the suit.

As to the nature of the *malikana* right, it has nothing to do with land. Its connection with the land is purely historical. It is not a grant of land revenue. It is a grant of money ; of an annual sum in perpetuity. Pensions Act, 1871, cited.

(*Lord Tomlin* refers to the definition clause in section 3 of the Pensions Act).

(*Lord Blanesburgh* : Shortly stated, what is meant by the definition in section 3 is that a grant of money or land revenue includes a pension).

(*Lord Blanesburgh* : If *malikana* is not immoveable property, then the plaintiff is out of time).

To determine whether a claim is time-barred, we must consider (1) what is the nature of the property, and (2) what is the nature of the suit. Appellant's learned counsel, Mr. DeGruyther, relied upon Art. 141. To see what is meant by the words "Like suit" in Art. 141, we must look at the preceding Article 140, to see how much of it is imported into Art. 141. "Like suit" in Art. 141 means a suit for possession of immoveable property by a Hindu or Muhammadan entitled, etc.

(*Lord Blanesburgh* : Art. 141 says "entitled to," in substitution for a remainderman or reversioner).

The person entitled is not a reversioner, but an heir to be ascertained on the death of the Hindu female.

Refers to the plaint, paragraph 13. It is not a claim to recover possession, but a claim for a declaration of right as regards the *malikana*. It does not come under Art. 141.

(*Sir Lancelot Sanderson* : Art. 141 is confined to suits for possession of immoveable property).

(*Lord Tomlin* : In England it has been held that an action for a declaration of title is an action to recover land).

Cites *Janaki Ammal v. Narayanasami* (1), at page 637 Lord Shaw's judgment, and paragraph, beginning, "The rule of the Hindu Law with regard to the nature of the widow's estate."

(*Sir Lancelot Sanderson* : There have been decisions in India to the effect that to see the real nature of the claim, we must look at the plaint).

(*Sir Lancelot Sanderson* : If the case as regards *malikana* does not come under Art. 141, why should Art. 144 not apply. It refers to "an interest in immoveable property?").

I submit that on the true construction of the document in question, *malikana* here is not immoveable but moveable property and, in any case, it is Art. 120 and no other Article which is applicable.

Argument with regard to O. 2, R. 2, C. P. C.

DeGruyther, K. C. for the Plaintiff-appellant : The claim for *malikana* was not barred by Order 2, Rule 2, Civil Procedure Code. The *malikana* was not "omitted" in the previous suit.

Section 11, Civil Procedure Code, cited, and *T. B. Ramachandra Rao v. A. N. S. Ramachandra Rao* (2) ; *Pittapur Raja v. Suriya Rao* (3) referred to.

(*Lord Tomlin* : In other words, you could not have included the *malikana* in the previous suit for want of the appropriate certificate under the Pensions Act).

Their Lordships' judgment was delivered by

Lord Tomlin : This is an appeal from a decree dated the 26th November, 1925, of the High Court of Judicature at Allahabad reversing in part a decree dated the 19th May, 1922, of the Subordinate Judge of Banda.

The plaintiff is under Hindu law the heiress of her father, Uttam Ram, who died on the 30th October, 1875, without having had a son. Her right to possession of her father's estate did not accrue until February, 1914 on the death of her father's widow, Deo Koer (hereinafter called the mother). The mother was entitled to the estate while living.

At the death of Uttam Ram there were also living his mother, Jarao Bai (hereinafter called the grandmother), and his deceased brother's widow, Man Koer (hereinafter called the aunt).

(1) (1916) 1 L. R. 39 Mad. 634 (637) ; L. R. 43 I. A. 207 ; 24 C. L. J. 309.

(2) (1922) 1 L. R. 45 Mad. 320 ; L. R. 49 I. A. 129 ; 35 C. L. J. 545.

(3) (1885) L. R. 8 Mad. 520 ; L. R. 12 I. A. 116.

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The estate of Uttam Ram included (*inter alia*) several villages, an 8-anna share in the village of Panchnehi, and a house at Wafnagar in Baroda.

The other 8 anna share in the village of Pachnehi was owned by Durga Prasad, who was a debtor to the estate of Uttam Ram.

After Uttam Ram's death the aunt, with the assistance apparently of the grandmother, got possession, to the exclusion of the mother, of some of the villages or of a half share therein, and also of the house at Wafnagar. The grandmother died in 1877.

By a document dated the 10th September, 1880, Durga Prasad, the mother and the aunt affected to release the village of Pachnehi to the Government in return for a perpetual *malikana* of Rs. 2,000, one-half of which represented the share of Uttam Ram's estate in the village and the other half of which represented the share of Durga Prasad therein.

By a sale deed dated the 6th October, 1880, Durga Prasad made over Rs. 500, representing one-half of his share in the *malikana* to the mother and the aunt in satisfaction of his indebtedness to Uttam Ram's estate. Thereafter, therefore, Rs. 1,500 out of the *malikana* of Rs. 2,000 formed part of Uttam Ram's estate. In fact, the mother and the aunt received payment of the *malikana* of Rs. 1,500 in equal moieties.

In 1886 the mother began a suit (No. 237 of 1886) in the Court of the Subordinate Judge at Banda against the aunt, seeking to establish her title as an heir of Uttam Ram to the villages, or share of villages, in the aunt's possession, and to dispossess the aunt therefrom, and to establish her title to the whole of the *malikana* of Rs. 1,500. No reference was made in the plaint to the house at Wafnagar.

The Subordinate Judge gave judgment in favour of the mother in respect of the villages, but held that in the absence of a certificate under the Pensions Act, 1871, the Court was not competent to deal with the *malikana*. The decision of the Subordinate Judge as to the villages was reversed on appeal to the High Court of Judicature at Allahabad. Thereupon the mother appealed to His Majesty in Council.

Pending the appeal of the mother to His Majesty in Council the plaintiff began a suit (No. 481 of 1890) in the Court of the Subordinate Judge of Banda against the mother and the aunt, seeking to establish her title as reversionary heir of Uttam Ram,

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subject to the mother's interest as widow to the immoveable property of Uttam Ram mentioned in the plaint, including the villages of which, or of a share of which, the aunt had possession. The plaintiff also sought to have a document dated the 9th October, 1877, purporting to be an arbitration award on which the aunt relied, declared invalid. The plaint referred to the village of Pachnehi, but contained no reference to the house at Warnagar.

On the 30th June, 1891, the Subordinate Judge declared that the plaintiff was entitled to succeed to the property in dispute on the mother's death, and that on the mother's death the arbitration award of the 9th October, 1877, and other proceedings by which the aunt had become possessed of the property in dispute would be void as against the plaintiff.

On the 16th January, 1894, an appeal by the aunt to the High Court of Judicature at Allahabad was dismissed with costs.

In the meantime the mother's appeal to His Majesty in Council in the suit No. 237 of 1886 came before their Lordships' Board, and in July, 1894, the appeal was allowed, and the judgment of the Subordinate Judge was restored in respect of the villages in dispute, but the view of the Courts below that under the Pensions Act, 1871, there was no jurisdiction in the absence of a certificate to deal with the *malikana* was affirmed (*see Deo Kuar v. Man Kuar* (1)).

As the result of this litigation the mother apparently recovered possession of all the villages, but the aunt continued to receive one-half of the *malikana* of Rs. 1,500, and remained in possession of the house.

The mother died in February, 1914, and, thereupon, the plaintiff succeeded to the property, possession of which had been recovered from the aunt.

The aunt died on the 20th June, 1920, having by her will, dated the 3rd July, 1919, affected to dispose in favour of her nephew, the defendant, of the share of the *malikana* which she was receiving and of the house at Warnagar.

The plaintiff then claimed to be entitled to the whole of the *malikana* of Rs. 1,500 and to the house. In consequence of the dispute the Government withheld payment of the *malikana*.

On the 15th December, 1920, the plaintiff having first obtained the necessary certificate under the Pensions Act, 1871, launch-

(1) (1894) L. R. 21 I. A. 148; I. L. R. 17 All. 1.

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ed against the defendant the present suit in the Court of the Sub-ordinate Judge of Banda.

By her plaint the plaintiff alleged (para. 9) that she was in possession of the entire property which was in the possession of the mother, but that on the death of the aunt it was found that the aunt had executed a will dated the 3rd July, 1919, in favour of the defendant in respect of the *malikana* amount certain *musafi* property and the house at Warnagar, whereas the aunt had not title or power to make a will, that the aunt was in possession merely in lieu of maintenance allowance as a widow of the family and that for this very consideration she had not been deprived and dispossessed of the *malikana* amount and other property, and that the will was totally invalid and ineffectual against the plaintiff, and (para. 13) that the mother as a widow had only a life interest in the family property, and that the aunt had no right in the property except that of maintenance, that the mother had no power to transfer to the Government by means of the document of the 10th September, 1880, the village of Pachnehi, which was of considerable value, and that, therefore, the plaintiff wanted to bring a suit for recovery of possession of the said property, but that as the time for the suit given in the certificate would expire on the 19th December, 1920, and as, according to law, it was necessary to give a formal notice to Government before the institution of a suit for recovery of possession of the property the plaintiff had in the plaint included only a claim for declaration of right as regards the *malikana* amount by invalidation of the will subject to her rights regarding recovery of possession of the property.

The plaintiff then asked (*inter alia*) for the following relief:

(a) That it might be declared that the alleged will of the aunt was invalid and unenforceable as against the rights of the plaintiff, and that by means of it the defendant had not acquired any rights to get Rs. 750 the *malikana* amount or any right in other property in respect of which the will had been made, and (b) that the plaintiff might be put in possession of the *musafi* property and the house at Warnagar by dispossession of the defendant.

On the 19th May, 1922, the Subordinate Judge ordered that the plaintiff's claim for a declaration as prayed in respect of the *malikana* and the house at Warnagar, and her claim for recovery of possession of the house be decreed. In his judgment the learned Judge held that the suit was not barred by Rule 2 of Order II of the Code of Civil Procedure, and that the aunt had not been in adverse possession of the *malikana* and the house

for over twelve years as against the plaintiff. He also held that the plaintiff's claim was not barred by the Limitation Act, and that the aunt had no right to dispose by her will of the *malikana* or the house. The Judge dismissed the suit as to the *munfi* lands, and there was no appeal by the plaintiff as to this part of his decision.

The defendant appealed to the High Court of Judicature at Allahabad against the decree so far as it was adverse to him. On the 26th November, 1925, the High Court allowed the appeals, set aside the decree of the Subordinate Judge so far as it related to the *malikana* and the house, and dismissed the suit. In the judgment of the High Court it was held that the aunt had been in adverse possession, that time began to run against the plaintiff in the life time of the mother when the aunt first took possession and that the plaintiff was, therefore, statute barred. It was further held that as in the previous suit (No. 481 of 1890) by the plaintiff against the mother and the aunt there had been no jurisdiction in the absence of a certificate to deal with the *malikana*, and as the house had not been included in the suit there was no *res judicata* binding the plaintiff.

The plaintiff obtained leave to appeal to His majesty in Council, and appealed accordingly.

Before their Lordships' Board it was but faintly contended by the plaintiff that the possession of the aunt had not been adverse, and their Lordships are of opinion that it was adverse.

On the part of the plaintiff it was urged that Article 141 of the Limitation Act applied, and that as under that article in a suit for possession by a Hindu entitled to possession of immoveable property on the death of a Hindu female the time allowed is twelve years from the death of the female, the plaintiff was entitled to succeed on the appeal, because at the institution of the suit twelve years had not run from February, 1914, the date of the death of the mother.

On the part of the defendant it was contended (1) that by reason of Rule 2 of Order II of the Civil Procedure Code the plaintiff was precluded from bringing the suit, having regard to the fact that she had in the previous suit (No. 481 of 1890) against the mother and aunt already sought to establish her title as heir; (2) that the *malikana* was not immoveable property; (3) that in regard to the *malikana* the suit was not a suit for possession, and that, therefore, Article 141 of the limitation Act, 1908, did not apply; (4) that so far as the *malikana* was concerned

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Article 120 applied, and that under that Article six years only from the date when the right of action accrued is allowed with the result that as more than six years had run between the date of the mother's death and the institution of the suit the plaintiff's claim in respect of the *malikana* was statute barred; and (5) that upon the true construction and effect of Article 141 of the Limitation Act, 1908, a reversionary heir is not entitled to the benefit of twelve years from the death of the female in a case where at the death of the female adverse possession had already run for twelve years against her in her lifetime, and that as the aunt had been in adverse possession against the mother for more than twelve years before the mother's death this Article could not avail the plaintiff, and that the barring of the mother in her lifetime had, upon the principle of the *Shivaganga* case (1), operated to bar the interest of the plaintiff.

These contentions of the defendant accordingly require to be dealt with seriatim :

(1) By Rule 2 of Order II of the Civil Procedure Code it is provided (subcl. 1) that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but that a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of the Court, and (subcl. 2) that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

By reason of the absence of a certificate under the Pensions Act, 1871, the Court, in the previous suit (No. 481 of 1890) was not competent to deal with the question of the *malikana*, and the plaintiff had no right of action in respect of it. In their Lordships' opinion the plaintiff's claim to the *malikana* was not, therefore, part of the claim which she was entitled to make in the previous suit. The house was not mentioned in the previous suit. In that suit the plaintiff was seeking to establish her title to her father's estate as heir in reversion on her mother's death. She was not seeking, and could not then have sought, to recover possession from the aunt of any particular item of property forming part of that estate. In the present suit she is seeking to recover possession of the house upon the footing that it forms part of the estate and that the defendant is in wrongful possession of it. The present cause of action arises out of tortious conduct

(1) (1863) 9 Moo. I. A. 539.

- on the part of the defendant or his predecessor the aunt in respect of the house, and is in their Lordships' opinion, a cause of action distinct from that in the previous suit. The claim which the plaintiff is now making could not in fact have been made in the previous suit.

The first contention of the defendant therefore fails.

(2) Their Lordships are satisfied that the point as to the *malikana* not being immoveable property was not taken in either of the Courts below, and that each of the Courts below treated the *malikana* as immoveable. In these circumstances, the defendant not being willing that there should be any remand of the case for further evidence, their Lordships are of opinion that the point is not open.

(3) Having regard to the language of paras. 9 and 13 of the plaint in the suit and to the form of the relief sought therein, their Lordships do not consider that the suit so far as the *malikana* is concerned is a suit for possession or within the operation of Article 141 of the Limitation Act.

(4) In their Lordships' view Article 120 is the relevant article so far as the *malikana* is concerned. Under the Pensions Act, 1871, however, there is, in their Lordships' opinion, no right of action at all in respect of such a subject-matter as the *malikana* unless and until a certificate under the Act has been obtained. Their Lordships therefore hold that as less than six years had run between the grant of the certificate and the institution of the present suit the plaintiff's claim in respect of the *malikana* is not statute barred under Article 120.

(5) Article 141 of the Limitation Act, 1908, admittedly applies to the claim to recover possession of the house. The point raised by the defendant upon the construction and effect of this article is of importance, and is one upon which there has been some difference of opinion in India.

Under Act XIV of 1859, suits for the recovery of immoveable property had to be brought within twelve years from the time when the cause of action arose. The Limitation Act of 1871 which repealed the Act of 1859, employed different language. Article 142 in the second schedule of that Act prescribed for a suit for possession of immoveable property by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow a period of limitation of twelve years beginning to run from the time when the widow died. This provision, enlarged so as to cover a suit by a Mohammedan, was reproduced in the Act of 1877, and again in Article 141 of the Act of 1908.

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The judgment of their Lordships' Board in the *Shivaganga* case (1) established the principle of the representation of the inheritance by a Hindu widow. That case was decided during the currency of the Act of 1859.

In *Hurrinath Chatterjee v. Mothoor Mohun* (2) their Lordships' Board held that the effect of the Acts of 1871 and 1877 was not to except from the rule laid down in the *Shivaganga* decision (1) the case where a decree had been obtained against a Hindu widow in her lifetime founded upon the law of limitation. Sir Richard Couch, in delivering the judgment of the Board, said: "Their Lordships see no ground for this contention." (i.e. that the case was excepted) "The words 'entitled to the possession of immoveable property' refer to the then existing law."

It is therefore established by this decision that where a decree founded upon the law of limitation is obtained against the widow in her lifetime the reversionary heir is barred and does not get the benefit of Article 141.

The question raised by the present case is whether the same result follows where there has been no decree, though at the death of the widow a stranger has been in adverse possession for twelve years or more.

In their Lordships' judgment where there has been no decree against the widow or other act in the law in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled, after the widow's death, to rely upon Article 141 for the purpose of the determination of the question whether the title is barred by lapse of time. To hold otherwise would in their Lordships' opinion, in effect, compel the Court in determining a question within the scope of the article to ignore the express words of the article.

But their Lordships are further of opinion that the point is already concluded by the judgment of their Board in *Runchordas V. Vandrawandas v. Parvatibhai* (3). In that case a testator who died in 1869, leaving two widows, devised the whole residue of his estate to trustees for *dharum*. One widow died in 1871, and the other died in 1888. After the death of the second widow the heir of the testator sued for a declaration that the devise to *dharum* was void and for administration. The High Court held that the gift in *dharum* was invalid and there was an

(1) (1863) 9 Mo. L. A. 539.

(2) (1893) L. R. 20 I. A. 183; I. L. R. 21 Calc 8.

(3) (1899) L. R. 26 I. A. 71; I. L. R. 23 Bom. 725.

• intestacy. The High Court further held that the possession of the trustees for *dharam* since the testator's death had been adverse as against the widows and the heir but that the plaintiff's claim to the immoveable property was not barred. It was also held that the plaintiff's claim to the moveable property was barred by limitation. On appeal to His Majesty in Council their Lordships' Board held that Article 141 of the Act of 1877 (now reproduced in Article 141 of the Act, 1908), applied to the immoveable property, and that under it time ran from the death of the second widow, and that, therefore, the plaintiff in the suit was not barred by limitation. It was also held that Article 120 of the Act, 1877 (now reproduced in Article 120 of the Act, 1908), applied to the moveable property, and that the right of the plaintiff in the suit to sue under that article only accrued on the death of the second widow, and was, therefore, also not barred.

The case of *Vathialinga Mudaliar v. Srirangath Anni* (1), illustrates the application of the rule in the *Shivagunga* case (2), where a decree founded upon adverse possession has been obtained against a Hindu widow in her lifetime. The decision is not, in their Lordships' judgment, in conflict with that in *Runcherdas Vandramandas v. Parvatibhai* (3) (*supra*), in which no decree had been obtained against the widow, nor had there been any other act in the law in the lifetime of the widow destroying the heir's interest.

In their Lordships' judgment, therefore, the appeal succeeds, with the result that the decree of the High Court ought to be discharged and the decree of the Subordinate Judge restored, and their Lordships will humbly advise His Majesty accordingly. The defendant must pay to the plaintiff the costs of the appeal to the High Court and the costs of the appeal to His Majesty in Council.

Summerhays, Son & Barber : Solicitors for the Appellant.

T. L. Wilson & Co : Solicitors for the Respondent.

A. T. M. ; K. J. R.

Appeal allowed.

(1) (1925) L. R. 52 I. A. 312 ; 42 C. L. J. 563.

(2) (1863) 9 Moo. I. A. 539.

(3) (1899) L. R. 26 I. A. 71 ; 1 L. R. 23 Bom. 725.

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APPELLATE CIVIL.

Before Mr. Justice Jack and Mr. Justice D. N. Mitter.

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February, 20, 28.

RAJENDRA NARAYAN BASU SARBADHICARY
AND OTHERS

v.

DEBENDRA NATH MUKHOPADHYA AND OTHERS.*

Executor—Personal Liability—Indemnity—Suit for rent—Discharge of executor.

A, a putnidar, died after executing a will, leaving his sons defendants Nos. 2 to 4. Defendant No. 1 his brother, was appointed executor. The putni was sold after A's death in execution of money decree against A and was purchased by defendants Nos. 1 to 4. The defendants Nos. 1 to 4 defaulted in the payment of putni rent for the years 1328 and 1329 B. S. The plaintiffs purchased the putni at a sale held under Reg. VIII of 1819 in 1331 for arrears of rent for 1330 B. S. Defendant No. 1 was discharged from his position as executor before the institution of the present suit for recovery of arrears of rent for the years 1328 and 1329 B. S. Prior to the present suit the rights of defendant No. 1 and defendants Nos. 2 to 4 were adjusted by a partition deed:

Held, that though the rent for which the suit was instituted accrued due during the period when defendant No. 1 was in charge of the estate as executor, he, the defendant No. 1 was not personally liable for the rent: *Ferhall v. Ferhall* (1) distinguished.

That as the putni was purchased by the executor defendant No. 1 in the ordinary course of management with assets which came into the hands of the executor at the time of the death of the testator, and in the absence of any proof that the putni did not bring any income during the period when it was in possession of defendant No. 1 as executor, the latter was entitled to be indemnified out of the testator's estate against the liabilities which he had properly incurred.

That the plaintiffs with whom the executor contracted to pay rent stood in the shoes of the executor and had the same indemnity as the executor had against the testator's estate and the executor had a right to an indemnity out of the assets of the testator's estate which included the after-acquired assets, namely, the putni: *Dowse v. Gorton* (2) and *Raybold v. Turner* (3).

Appeal by Defendants Nos. 2 to 4.

*Appeal from Appellate Decree No. 524 of 1927, against the decree of Babu Nitai Charan Ghose, Subordinate Judge of Murshidabad, dated the 7th September, 1926, affirming that of Babu Amulya Charan Chakrabarty, Munsiff, 1st Court, of Berhampur, dated the 5th February, 1925.

(1) (1871) L. R. 7 Ch. 123.

(2) [1891] A. C. 190.

(3) [1900] 1 Ch. D. 199.

Suit for rent.

The material facts appear from the judgment.

Dr. Sarat Chunder Basak, Messrs. Dinash Chunder Roy and Haridas Gupta for the Appellants.

Messrs. Probodh Chunder Chatterjee, Bireswar Chatterjee and Bijoy Coomar Chatterji for the Respondents.

C. A. V.

The following judgments were delivered :

Mitter, J.—The suit in which this appeal arises was brought by the plaintiffs, now respondents, for recovery of arrears of rent for the years 1328 and 1329 B. S. in respect of a certain putni tenure held by defendants Nos. 1 to 4 under them.

The case made in the plaint is that Narendra who was a brother of defendant No. 1 and the father of defendants 2 to 4 was the proprietor of the zemindary under which the putni in question is held; that he sold the zemindary to the plaintiffs and took the putni settlement from them in the benami of defendant No. 6 in 1319 B. S.; that the putni was sold in execution of a money decree against Narendra and it was purchased by defendants 1 to 4 in the name of defendant No. 5, wife of defendant No. 1 in the year 1917; that Narendra made a Will by which he appointed defendant No. 1 as executor; that the money execution sale took place after the death of Narendra and the purchase was made by defendant No. 1 for self and as executor to the estate of Narendra, father of defendants 2 to 4; that shortly after the auction purchase defendant No. 5 executed a deed of release in favour of defendant No. 1; that the deed of release stated that the release was in favour of defendant No. 1 in his personal capacity as well as in his capacity as executor to the estate of Narendra; that defendant 1 to 4 defaulted in the payment of putni rent for the years in suit and hence the suit. The plaintiffs further alleged that they purchased the putni at a sale held under Regulation VIII of 1819 in 1331 for arrears of rent for 1330 B. S.

Defendant No. 1 did not contest the suit. Defendants Nos. 2 to 4 by their defence denied the relationship of the landlord and tenant with the plaintiffs; they contended that the putni in respect of which the present rent suit was brought was the *Sri-dhan* property of defendant No. 5.

The Munsiff held that the defendants 1 to 4 were the real owners of the putni and as defendant No. 1 was discharged from his position as executor before the institution of the suit the plaintiffs'

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proper remedy was against defendants 1 to 4 personally. He accordingly decreed the suit against defendants 1 to 4, dismissing plaintiffs' claim against defendants 5 and 6 on the ground of want of cause of action.

Against this decision an appeal was taken by the defendants 2 to 4 to the Court of the Subordinate Judge of Murshidabad who has affirmed the decision of the Munsiff.

An appeal has been taken to this Court by defendants 2 to 4 against the decision of the Subordinate Judge and it has been argued by their learned Advocate that as the rent for which the suit has been instituted accrued due during the period when defendant No. 1 was in charge of the estate as executor, he, the defendant No. 1, was personally liable for the rent and as such the decision of the Courts below making the appellants liable for rent cannot possibly be sustained in law; and in support of this contention reliance has been placed on the case of *Farkall v. Farkall* (1). The case of *Farkall v. Farkall* (1) is obviously distinguishable. There the executrix borrowed money from a certain bank for the purpose of paying the debts of the estate but she did not do so and in these circumstances it was held that the executrix was personally liable. The true footing on which this case should be decided is this:—The putni in question was purchased with assets which came into the hands of the executor at the time of death of the testator. The putni so acquired is as much assets of the testator Narendra as that which was in his possession at the time of his death, see *Abbott v. Parfitt* (2). The putni was purchased by the executor defendant No. 1 in the ordinary course of his management of the testator's estate. It is not shown that the putni did not bring any income during the period when it was in possession of defendant No. 1 as executor. In these circumstances the executor defendant No. 1 is entitled to be indemnified out of the testator's estate against the liabilities which he has properly incurred. It is contended that the indemnity should be limited to the putni acquired by the executor and as the putni has already been sold the executor should be held personally liable for the entire rent. This contention is not, in our opinion, a sound one in view of the decision of the House of Lords in the case of *Dowse v. Gorton* (3). In that case a testator's business was carried on for about three years by his executors after his death in accordance with the pro-

(1) (1871) L. R. 7 Ch. 123.

(2) (1871) L. R. 6 Q. B. 346.

(3) [1891] A. C. 190.

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visions of the will and with the assent of the testator's creditors in the interest of the creditors as well as of the beneficiaries and was properly carried on and it was held that the executors were entitled (in priority to claims by the testator's creditors) to be indemnified out of the testator's estate against the liabilities which they had properly incurred, and that the indemnity was not limited to that portion of the assets which had come into existence or changed its form since the testator's death. It is not said in the present case that in purchasing the putni the executor was doing any act which he was not entitled to do under any provision of the Will of Narendra. I think the principle underlying the decision of *Dowse v. Gorton*, (1) above referred to, applies to the facts of the present case. The plaintiffs with whom the executor contracted to pay rent stand in the shoes of the executor and have the same indemnity as the executor has against the testator's estate and the executor has a right to an indemnity out of the assets of the testator's estate which includes the after-acquired assets namely the putni. Once it is shown that the executor is entitled to be indemnified out of the estate of the testator, plaintiffs who have recovered judgment against the executor should have the benefit of this right to indemnity and should realise their dues from the assets of the testator. In this connection the following observations of Mr. Justice Byrne in the case of *Raybold v. Turner* (2) may be usefully referred to :—"But the authority of *Bennett v. Wyn-aham* (3) goes to show that if a trustee in the course of the ordinary management of his testator's estate, either by himself or his agent, does some act whereby some third person is injured, and that third person recovers damages against the trustee in an action for tort, the trustee, if he has acted with due diligence and reasonably is entitled to be indemnified out of his testator's estate. When once a trustee is entitled to be thus indemnified out of his trust estate, I cannot myself see why the person who has recovered judgment against the trustee should not have the benefit of this right to indemnity and go direct against the trust estate or the assets, as the case may be, just as an ordinary creditor of a business carried on by a trustee or executor has been allowed to do, instead of having to go through the double process of suing the trustee, recovering the damages from him, and leaving the trustee to recoup himself out of the trust estate. I have the parties

(1) (1891) A. C. 190.

(2) [1900] 1 Ch. D. 199.

(3) (1862) 4 DeG. F. & J. 259.

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interested in defending the trust estate before me, and I have also the trustee, and he claims indemnity, and, assuming that a proper case for indemnifying him is made out by the evidence, I think his claim should be allowed."

It is true that this was a case of tort by a trustee in the course of management of the trust estate. But we think the same principle ought to apply to a case where liabilities are incurred on the basis of a contract entered into with a third person in the course of management of the testator's estate, by the executor. It is also to be noticed that the defendant No. 1 was discharged from executorship at the date of the institution of the suit and that prior to the suit the rights of defendant No. 1 and the appealing defendants had been adjusted by a partition deed. In this view we think that the Courts below have arrived at a right conclusion and this appeal must be dismissed with costs.

Jack, J. :—I agree.

A. T. M.

Appeal dismissed.

PRIVY COUNCIL.

PRESENT: Lord Carson, Lord Atkin and Lord Salveson.

JAMES RICHARD RENNEL SKINNER

v.

KUNWAR NAUNIHAL SINGH.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT ALLAHABAD.]

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1929.

March, 19.

Limitation—Indian Limitation Act (IX of 1908) Sec. 9, Sch. I, Art. 134, 140, 148—Transferee from mortgagee, when entitled to protection of Article 134—Life-tenant purporting to act as absolute owner and dealing with the property as such—Reminderman, accrual of rights of—New plea of limitation raised for first time in appeal—Material facts neither proved nor admitted—Continuous running of time.

A defendant cannot be allowed to urge a new plea of limitation for the first time in an Appellate Court on a point not taken before the trial Judge, where no evidence had been given in the Court below to support the plea, and the facts which the defendant must establish to substantiate the new point thus raised are neither proved nor admitted.

It is highly irregular for any Court either to assume without the admission of all parties that material facts are not in dispute or to proceed to draw inferences from those facts where no evidence of them has been placed before the Court.

When time has once commenced to run, it will not cease to do so by reason of the happening of any subsequent event (section 9, Indian Limitation Act).

The transfer of property by mortgage contemplated by article 134 of the Indian Limitation Act, 1908, is admittedly something other than an express transfer of the original mortgage. The article contemplates a transfer by a mortgagee purporting to transfer a larger interest than that given by the mortgage or at any rate an interest unencumbered by a mortgage. The Article is not, however, limited in its application to cases where the mortgagee transfers the property mortgaged while still ostensibly a mortgagee, nor to cases where the mortgagee transfers possession which he had obtained *qua* mortgagee. For the application of Article 134, it is immaterial that the mortgagee should have thought he was absolute owner if in fact he was mortgagee, and immaterial whether he got possession before, under or after the mortgage if in fact he purported to transfer the property to the transferee.

Article 134 does not protect the transferee of a mortgage by express transfer, nor does it protect a person who has taken a transfer only of a mortgage, but has taken it without his knowledge mistakenly supposing that he was getting something better.

In September, 1863, Thomas Skinner, the plaintiff's father, created a simple mortgage of the five villages in suit in favour of Seth Lakshmi Chand and Seth Gobind Das (hereafter referred to as the Seths), with a covenant to put the mortgagees in possession on default of payment of principal and interest on the due date. The principal was not so paid, but the mortgagees did not enter into possession during the mortgagor's lifetime. In October 1864, Thomas Skinner made a Will by which he left successive life interests to three of his sons with ultimate remainder to his daughter, the plaintiff in the present suit. Each interest was contingent on the holder of the prior estate dying without lawful male issue. In the next month (November 1864) Thomas Skinner died and his eldest son Thomas Browne Skinner became tenant for life, but assuming in point of fact an absolute interest in the property and acting on the footing that he was the absolute owner of his father's, Thomas Skinner's estate in the villages, he, Thomas Browne Skinner in November 1867 mortgaged the villages aforesaid, with possession, to the Seths for Rs. 50,000, which was expressed to include Rs. 43, 294 due on the original mortgage of 1863. In 1872, in execution of simple money decrees against Thomas Browne Skinner, his equity of redemption in the villages was sold to the Seths, who therefore entered into possession of them on the footing of being absolute owners. In December, 1898, the Seths, purporting to be absolute owners, mortgaged with possession the five villages to the Nawab of Rampur "with all the proprietary and remanent rights" and in September 1903 they sold the whole of the mortgaged property (including the five villages in suit) to the mortgagee, the Nawab of Rampur, in satisfaction of all claims under the mortgage. In April 1904 the Nawab of Rampur, describing himself as the absolute owner of the suit villages, sold them to the defendant, Kunwar Nannihal Singh.

The three sons of Thomas Skinner who were successively life tenants under his will having died, without legitimate male issue, in 1900, 1913 and 1919 respectively, the plaintiff (his daughter) succeeded to an absolute interest in the

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property of her father, Thomas Skinner, and she brought the present suit, in 1920, against the defendant, Kunwar Naunihal Singh, for redemption of the five villages :

Held, (treating the suit as one to redeem the mortgage of 1863 created by Thomas Skinner) (the defendant's predecessors-in-title not having acquired an absolute title through Thomas Browne Skinner, who took only a life-interest though purporting to act as absolute owner in mortgaging the property to the Seths in 1867) that the suit was not barred by Article 134, of the Indian Limitation Act and was well within the period of limitation prescribed by Article 148, the statutory period of 60 years, computed from the original mortgage of 1863 not having expired when the plaintiff filed the present suit in 1920, and that in any case, by Article 140 the plaintiff's right to sue as a remainderman under her father's will did not arise until 1919, when on the death of her last surviving brother without issue, she, by virtue of the remainder to her, became entitled to possession.

Appeal No. 86 of 1927 by the Plaintiff from a judgment and decree, dated the 27th March, 1925, of the High Court, Allahabad (*Lindsay and Kankaiya Lal JJ.*), which reversed a judgment and decree, dated the 23rd February, 1922, (including the order and decree, dated the 20th January 1923), of the Subordinate Judge of Muzaffarnagar.

The material facts of the case appear sufficiently from their Lordships' judgment, and also from the proceedings in the High Court, reported in I. L. R. 47 All. 803 and they have been narrated before in the case of *Richard Ross Skinner v. Naunihal Singh* (1).

The plaintiff, Mrs. Alice Georgina Skinner (since deceased, and now represented by the appellant) instituted the present suit on the 11th May 1920, to recover possession of five villages from the respondent, by redemption of a mortgage, dated the 1st September, 1863, under which those villages and others were mortgaged by Thomas Skinner, her father, to third persons, namely, Seth Lakshmi Chand and Seth Gobind Das. The respondent filed a written statement in which he pleaded, *inter alia*, that the plaintiff's suit was barred by limitation. The Subordinate Judge held that the suit was not so barred, but the High Court held the contrary, deciding that the plaintiff's suit was barred by limitation under Article 134, Limitation Act, 1908.

Mr. Justice Lindsay summed up his conclusion in the following words :—

"I am not prepared to accept the argument that the possession which the transferor has at the time of the transfer must

(1) (1913) L. R. 40 I. A. 105 ; I. L. R. 35 All 211, 17 C. L. J. 555.

necessarily have been acquired under the mortgage originally made in his favour. It seems to me that, even if the mortgage was a simple mortgage and if the mortgagee subsequently gets possession of the mortgaged property otherwise as, for example, by purchase in execution of a simple money decree obtained by another creditor, the Article 134 will still apply if it is established at the time the transfer is made the mortgagee was in possession, no matter under what title. The Article is designed for the protection of a transferee who has been led by a mortgagee to believe that he is acquiring not merely mortgagee rights, [but a full proprietary title. To quote the words of their Lordships of the Privy Council in *Radhanath Doss v. Gishorns* (1) in construing the cognate section under the old Act XIV of 1859, purchaser must mean some person who purchases that which is *de facto* a mortgage upon a representation made to him and in the full belief that it is not a mortgage, but an absolute title".

"When Seth Lakshman Das sold to the Nawab in 1903 he was in possession of these five villages and had been so for over thirty years. He purported to convey an absolute title to the Nawab, and no-doubt believed that he had a right to do so on the understanding, mistaken though it was, that he had acquired the proprietary right by the purchase of Thomas Browne Skinner's equity of redemption in the year 1872. That the Nawab gave valuable consideration for the sale is clearly established, as is also the fact that in the following year, 1904, Naunihal Singh paid the Nawab Rs. 1,77,000 for the full proprietary interest in these villages. For these reasons, I hold that the plea of limitation raised under Article 134 must prevail and that Naunihal Singh is not liable to be ejected now in a suit for redemption of the mortgage of 1863."

Mr. Justice Kanhaiya Lal, in concurring generally with the conclusions arrived by his learned colleague, Lindsay J., added the following observations :—

"The object of Article 134 is to protect transferees for value who have purchased an interest larger than that possessed by the transferor, and have been allowed to remain in possession and enjoyment of such larger interest for a period of more than 12 years. In the matter of the mortgaged properties so transferred, it controls Article 148 of the Indian Limitation Act in the same way as it controls Article 140. If the mortgaged property is in the possession not of the mortgagee, but in that of a transferee from him, who claims to have purchased a larger interest therein for

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consideration what a man is not allowed to do under Article 148 of the Indian Limitation Act, he cannot be allowed to do under Article 140 after such possession has been held for more than 12 years.

"The question is not free from difficulty, but in view of the equities of the case and the long and continuous litigation which the transferee had to face both before his possession of 12 years was completed and after it, there is no ground for allowing the remainderman to oust him after such period has expired. It may be that Richard Ross Skinner was suing for possession of the disputed property as much in his own interest as that of his successors, but the order refusing to allow substitution after his death was not challenged and allowed to become final, and a remainderman, who sues for redemption of the mortgage cannot escape the consequences which Article 134 prescribes."

In the result, the High Court allowed the present respondent's appeal, set aside the decree of the Subordinate Judge, and made a decree dismissing the plaintiff's suit with costs. Against the said decree of the High Court the present appeal was preferred to His Majesty in Council by the appellant, who had been substituted in the place of the deceased plaintiff.

DeGruyther K. C. and *K. Brown* for the Appellant.

Upjohn K. C. and *Dube* for the Respondent.

DeGruyther, K. C.: Article 140 applies to the case. The plaintiff did not become entitled to possession till 1919, and the period of 12 years prescribed by Article 140 did not run till then. Article 134 applies only when there has been a transfer by a mortgagee representing that he transfers an absolute title. In the present case the transfer was of an absolute estate, though that estate was for life only owing to the construction placed upon the will. The High Court give an effect to Article 134 which deprives Article 140 of all value. It is a cardinal principle of limitation law that persons are not barred during the time in which they cannot sue: Refers to *Bhagwan Sahai v. Bhagwan Din* (1); *Ram Piari v. Budh Sen* (2); *Ramchandra v. Sheikh Mohidin* (3); *Husaini Khanam v. Husain Khan* (4) and *Radhanath Doss v. Gisborne* (5).

Upjohn, K. C. for the Respondent: The position of Article 134 is by way of an exception to Article 148. Section 9 of the Limita-

(1) (1886) 1. L. R. 9 All. 97.

(2) (1920) 1. L. R. 43 All. 164.

(3) (1899) 1. L. R. 23 Bom. 614.

(4) (1907) 1. L. R. 29 All. 47f.

(5) (1871) 14 M. I. A. 1; 6 B. L. R. 530.

tion Act lays down that when once the statute commences to operate, it runs on, whatever happens subsequently.

(*Lord Carson* : That is, no doubt, the settled law).

Article 134 deals with a redemption action.

(*Lord Atkin* : Article 134 is not confined to what may be an action for redemption).

Equity has nothing to do with statutes of limitation, and there is no rule that they are to receive an equitable construction. They are statutes of great public importance, and should be given effect to, irrespective of all equitable consideration : (Refers to *Lachmeo Buxsh v. Runjeet Ram* (1)).

(*Lord Atkin* : The appellant's learned counsel wants to rely on Article 140, if you bring yourself under Article 134).

Article 134 qualifies Article 148.

(*Lord Salvesen* : Article 148 would apparently apply though the mortgagee assigned the mortgage).

(*Lord Carson* : If the mortgagee lets anyone in possession, that would not preclude the mortgagor from redeeming within 60 years apart from question of adverse possession).

Refers to section 10 of the Limitation Act, and to the exception therein "not being assigns for valuable consideration."

(*Lord Atkin* : The section says nothing about the assignee being in good faith).

Article 134 works out the exception which we find in section 10.

(*Lord Carson* : Probably, if the purchaser did not take in good faith from the trustee, he would not be protected).

(*Lord Salvesen* : A mere transfer of a mortgage does not come under Article 134).

(*Lord Salvesen* : Article 134 refers to a case where immoveable property (not the mortgage) has been transferred, and assumes that the transferee has been put into possession).

(*Lord Carson* : You have to show that the person who conveyed to you was the mortgagee).

Article 134 assumes that the plaintiff is a mortgagor or a person claiming under him. It also assumes that the defendant is a transferee from the mortgagee, and the action must be to redeem or to recover possession. An action under Article 134 must be such an action as is mentioned in Article 148, i. e., a claim to redeem, and, as a result of redemption, to get possession; the plaintiff alleging that "Your transfer is not good against me. You took from a person who could not give a title to you." Article 134

(1) (1873) 13 B. L. R. 177 ; 20 W. R. 375.

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does not introduce a new cause of action. It stands just in the same relation to Article 148 with regard to mortgages, as Article 134 does to section 10 with regard to trusts. Article 134 merely qualifies Article 148, and both articles must be read together.

(*Lord Salvesen* : Article 134 contemplates that it must be a transfer of immoveable property, and possession must be with the transferee).

Article 148 refers to a suit "to redeem", when the mortgagee is not in possession, and "to recover possession", when the mortgagee is in possession. Both Articles 134 and 148 relate to the same subject-matter, and to an action by the same plaintiff.

The transfer in this case was not of a mortgage, but was a transfer in absolute ownership, and comes within what Lord Cairns says in *Radhanath Dass v. Gisborne* (1). The Nawab took by way of mortgage what was *de facto* a mortgage upon a representation made to him that it was not a mortgage but an absolute title.

Although Article 134 does not mention "mortgagor", yet it is implied that the action contemplated by it is by the mortgagor to redeem on the terms of the original mortgage.

(*Lord Atkin* : Surely the article is not confined to an action by the mortgagor?).

(*Lord Atkin* : Under Article 134, the mortgagor's suit need not always be one to redeem).

(*Lord Carson* : It would not always be a suit for redemption. It may be a suit to recover possession).

(*Lord Atkin* : It is rather a wide proposition to lay down that Article 134 refers to a suit by the mortgagor to redeem).

Yes, if it is a suit on the footing that the mortgage has been paid off, it would be a suit to recover possession. The plaintiff must be a person who claims under the mortgage and whose claim to possession is based on the footing of the mortgage).

(*Lord Atkin* : If it is a mere transfer of the mortgage, Article 134 does not apply).

(*Lord Atkin* : Under Article 134 the transfer has not to be by the mortgagee *qua* mortgagee but while he is a mortgagee).

(*Lord Carson* : Possession must be derived from the mortgage, and at the same time it must not be a mere transfer of the mortgage).

If the mortgagee has a power of sale and sells under that power, the purchaser does not need the protection of Article 134. The

• article would apply when the mortgagee purported to sell under such power, but had, in fact, no such power to sell.

The common case to which Article 134 applies is, where the mortgagee makes the transfer, believing he has a better title (than as mortgagee) to convey the property. The article applies only to property which is the subject of mortgage, and to a case where the property has been mortgaged and when the mortgagee who has made the transfer is the mortgagee of the property.

Possession is not referred to in Article 134. Refers to *Ramchandra v. Sheikh Mohidin* (1) and *Husaini Khanam v. Husain* (2) reversed on a different point, in *Bakhtawar Begam v. Husaini Khanum* (3).

(*Lord Salvesen* : The Privy Council decided the case on another point. I should like to know if the view taken in *Husaini Khanam v. Husain* (2) received the confirmation of their Lordships when it came up before the Board).

(*Lord Atkin* : The Board did not consider the question discussed in *Husaini Khanam v. Husain* (2).

Article 134 does not require possession. The decision in *Husaini Khanam v. Husain* (2) really shows that possession under Article 134 is not strictly necessary.

(*Lord Salvesen* : Article 134 is really an exception to Article 148).

Article 140 applies only to a case of successive interests by way of particular estate and to remainders and reversioners.

As to the right to redeem, see section 60, *et seq.*, of the Transfer of Property Act.

Article 141 of the Limitation Act deals separately with a Hindu widow, and that shows that she does not come in under Article 140.

Section 91 of the Transfer of Property Act points out who may sue for redemption.

(*Lord Carson* refers to section 92 of the Act as to a decree in a suit for redemption).

(*Lord Atkin* refers to *Ram Chandra v. Kallu* (4).

(*Lord Atkin* : Section 92 of the Transfer of Property Act is now replaced by the Civil Procedure Code, 1908, Order 34).

Mayne's Hindu Law, Chapter 20, para 638, cited as to reversionary rights.

(1) (1899) L. L. R. 23 Bom. 614. (2) (1907) I. L. R. 29 All. 471.

(3) (1914) I. L. R. 36 All. 195 ; L. R. 41 I. A. 84 ; 19 C. L. J. 472.

(4) (1908) I. L. R. 30 All. 497.

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The judgment in *Ram Chandar v. Kallu* (1) only decides that a person who has got no interest in the mortgaged property has no right to redeem. In section 91, Transfer of Property Act, the expression "mortgaged property" is used in the same sense as the word "property" is used in Article 134, Limitation Act.

Successive independent interests are referred to in Article 140. That article on the face of it cannot apply to the present case. There is here one right and one right only, but no new right, and therefore Article 140 has nothing to operate upon. Under Article 140 each successor has a right of his own, and consequently the article gives a new period to him when his right accrues. Article 140 has no effect on the running of time under Article 148.

Article 134 confers a benefit on a transferee from the mortgagee. It is supplementary to Article 148.

Dube follows: Refers to as to the interest of a Hindu reversioner *Amrit v. Gaya* (2).

Refers to section 5 of the Limitation Act of 1859.

(*Lord Atkin*: But a purchaser who took merely an assignment of the mortgage in terms, would not be protected by that section).

As to the interpretation of the word "purchaser" in the Limitation Act, 1877, Article 134, refers to *Abhiram v. Shyama Charan* (3) *Ishwar Shyam Chand Jiu v. Ram Kanai* (4), and to the proceedings on review reported in 14 C. W. N. 244. The word "purchased" in Article 134 is now changed into "transferred" in the Limitation Act of 1908.

K. Brown replies: Our contention is that Article 148 applies. If the appellant relies on Article 134, we submit that Article 140, which is a special article, covers the case.

(*Lord Atkin*: Article 134 would apply when the mortgagee purported to grant some right higher than he had under the mortgage).

Article 148 applies equally to a transferee as to the original mortgagee. The transferee is put in the position of an assignee of the mortgagee.

(*Lord Salomon*: If a mortgagee sells as if he were absolute owner, then the mortgagor loses his right unless he comes in within 12 years. Article 134 would apply to this class of cases).

(*Lord Carson*: If you have only an assignment from the mort-

(1) (1908) I. L. R. 30 All. 497.

(2) (1917) I. L. R. 45 Calc. 590 (P. C.); 27 C. L. J. 296.

(3) (1909) I. L. R. 36 Calc. 1003; L. R. 36 L. A. 148; 10 C. L. J. 284.

(4) (1911) I. L. R. 38 Calc. 526; L. R. 38 I. A. 76; 14 C. L. J. 238.

- gagee, Article 134 does not operate ; it is only when you get a larger interest from the mortgagee, and you take it *bona fide*, that Article 134 may come in).

We submit that Articles 134 and 140, dealing as they do with suits for possession, should be read together.

Their Lordships' judgment was delivered by .

Lord Atkin. This is an appeal from the High Court at Allahabad in a suit brought by Mrs. Alice Georgina Skinner against the respondent for the redemption of five villages specified in the plaint. The question that has to be determined by this Board is whether the defendant is protected by article 134 of the Limitation Act of 1908. The suit involves the dispositions of the property of the plaintiff's family which have been the subject of litigation in India on previous occasions. For the present purpose it is necessary to state the material facts in order of date. In September, 1863, Thomas Skinner, the plaintiff's father, mortgaged the villages in suit together with other property to Seth Lakshmi Chand and Seth Gobind Das for the sum of Rs. 50,000. It was a simple mortgage, with a covenant to pay the principal on the 31st December, 1863, and to put the mortgagees in possession if there was default in payment of principal and interest. The principal was not duly paid ; but it does not appear that the mortgagees took possession at any rate during the mortgagor's lifetime. In October, 1864, Thomas Skinner made a will by which in the events that happened he left successive life interests to three of his sons with ultimate remainder to his daughter, the plaintiff. Each interest was contingent on the holder of the prior estate dying without male issue ; but the three sons who were successively life tenants did die without lawful issue. In November, 1864, Thomas Skinner died, and his eldest son, Thomas Browne Skinner, became tenant for life. In fact, however, Thomas Browne Skinner assumed an absolute interest in the property ; it was not until the will of his father received interpretation from this Board in 1913 in a suit brought by the second son that the limited interests were judicially ascertained. Acting as absolute owner in November, 1867, Thomas Browne Skinner mortgaged the property which was the subject of the original mortgage of 1863 to Seth Gobind Das for the sum of Rs. 50,000, which was expressed to include Rs. 43,294 due on the original mortgage. The principal sum and interest was to be paid in eight years. The name of Seth Gobind Das was to be entered in the revenue papers as mortgagee and that of Thomas Browne Skinner

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as proprietor; the mortgagor was to continue to collect the rents under the supervision of agents of the mortgagee and the proceeds less agreed deductions were to be applied to reducing the amount due. In 1872, money decrees were obtained against Thomas Browne Skinner and his equity of redemption in the villages in suit was sold in execution and bought by Seth Lakshmi Das who therefore entered into possession of them on the footing of being absolute owner. It will be observed that the above transactions took place in the names of Lachman Chand and Gobind Das, Gobind Das, and Lachman Das respectively, but it has been assumed throughout, no doubt accurately, that the parties duly represented the original mortgagees of the mortgage of September 1863. On the 26th December, 1898, Lachman Das, purporting to be absolute owner, mortgaged with possession the five villages with such other property to the Nawab of Rampur for Rs. 15,00,000 "with all the proprietary and zemindari rights." On the 24th September, 1903, the collector of Muttra, acting as guardian of the infant sons of Lachman Das, sold the whole of the mortgaged property together with jewellery, which had been the subject of a previous mortgage, to the Nawab of Rampur in satisfaction of all claims under the mortgages. The conveyance transfers all the estate right, title and interest of the wards in the property which included, of course, the five suit villages. On the 11th April, 1904, the Nawab of Rampur sold the five villages to the respondent, Naunihal Singh, for Rs. 1,77,000. The purchaser had the prudence to take what appears to be a warranty of title, for which he may ultimately have occasion to be grateful. Meantime, in 1900, Thomas Browne Skinner died. He was succeeded by his brother, Richard Ross Skinner, who, in 1906, commenced a suit against the present respondent, amongst others, to recover possession of the suit villages and other property. In this suit it was decided by this Board reversing the decision of the High Court that under the will of Thomas Skinner, his son, Thomas Browne Skinner, took only a life interest, and therefore respondent's predecessors in title could not have acquired through him an absolute interest. They held, however, that though Lachman Das did not acquire an absolute interest from Thomas Browne he yet, notwithstanding the terms of the mortgage of 1867, must be held to be still entitled to his rights under the mortgage of 1863 created by Thomas Skinner. These rights, it was held, passed to the subsequent purchasers, and therefore the plaintiff Richard Ross Skinner was

• not entitled to recover possession of the property except on condition that he redeemed the mortgage security. The suit was remitted for this condition to be performed, but in 1913 Richard, the plaintiff, died and the suit abated. He was succeeded by his brother George who, in 1917, filed a suit for redemption against the present respondent and others in respect of the five suit villages and other property. However, in 1919, George died and his suit abated. He was succeeded by his sister Alice, who brought her suit for redemption against the present respondent and others for recovery of possession and redemption of the suit villages and other property. In the course of the proceedings Mrs. Alice Skinner, the plaintiff, died, but as she had acquired an absolute interest this suit was not abated, and is continued by James Skinner, her executor, the present appellant. By their written statement the defendants disputed the plaintiff's title and claimed to have been in adverse possession by themselves or their predecessors since 1872. The learned Subordinate Judge found in favour of the plaintiff's title as to which there is now no dispute. He held that the defendants could not avail themselves of adverse possession both because the time for redemption was, by article 148 of the Limitation Act, 60 years which had not expired, and because in any case, by article 140, the plaintiff's right to sue did not arise until 1919, when after the death of the tenants for life she, by virtue of the remainder to her, became entitled to possession. The learned Judge therefore decided in favour of the plaintiff and made a preliminary order on the 23rd February, 1922, that the defendants should within a month deliver accounts of the income received from the villages during their possession in order that he might arrive at a fixed sum. This order, not being appealed, on the 20th January, 1923, the learned Judge made a preliminary decree for redemption in which he fixed the sum due to the defendants on account of principal, interest and costs to be Rs. 1,09,641, and decreed that if the plaintiff paid that sum into Court before the 3rd July, 1923, the defendants should retransfer the property to her and that on default by the plaintiff the property should be sold. From this decree an appeal was brought and by permission of the High Court a further appeal was entered from the order of the 23rd February, 1922. On the hearing before the High Court the defendants for the first time raised the defence that they were entitled to succeed by reason of the provisions of article 134, which fixed the period of limitation for a suit, "to

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recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration," at 12 years from the date of the transfer. No evidence had been given in the Court below to support the plea. Such evidence must include all the documents of mortgage and sale which have been set out above, and which had not been proved or printed. The learned Judges, however, came to the conclusion that as there could be no doubt as to the material facts and as the necessary documents had been printed before in the case decided by the Privy Council in 1913 they should allow the point to be argued. Their Lordships cannot approve of this decision, which appears to have been made against the protests of the then respondents. It appears to their Lordships to be highly irregular for any Court either to assume without the admission of all parties that material facts are not in dispute or to proceed to draw inferences from those facts where no evidence of them has been placed before the Court. The position is not improved where the matter is mooted for the first time in an appellate Court on a point not taken before the trial Judge. Their Lordships would have felt a difficulty in permitting the respondent to rely upon this ground before them were it not that before the Board the appellant consented to the question being raised on the materials placed before the High Court. With this expression of opinion upon the procedure below their Lordships therefore proceed to determine the appeal. When the facts and documents are examined it appears that the defence founded on article 134 cannot be supported. The transfer of property mortgaged contemplated by article 134 is admittedly something other than an express transfer of the original mortgage. The article contemplates a transfer by a mortgagee purporting to transfer a larger interest than that given by the mortgage or at any rate an interest unencumbered by a mortgage. Such an interest purported to be transferred by Lachman Das's mortgage to the Nawab of Rampur in 1898 where the mortgagor purported to mortgage as absolute owner; and also purported to be transferred by the sale in September, 1903, under which the respondent claims his absolute title. Their Lordships have little doubt that had Thomas Browne Skinner had the absolute title to the equity of redemption at the time when Lachman Das purported to transfer the absolute title to the Nawab the case would have been brought within section 134. The appellant sought to put a limited construction on the

- article by contending that it only applied where the transfer took place while the mortgagee was mortgagee, or at any rate transferred possession which he had obtained as mortgagee. It did not apply, they said, where, as here, the mortgagee had apparently ceased to be mortgagee by getting in the equity of redemption, and had obtained possession not under the mortgage but under the purchase of the equity in 1872. Their Lordships see no reason for accepting this view. It appears to them to be immaterial that the mortgagee should have thought he was absolute owner if in fact he was mortgagee; and immaterial whether he got possession before, under or after the mortgage if in fact he purported to transfer the property to the transferee. But in the present case the transfer which is *ex concessis* ineffective to give the absolute title was made during the existence of the particular estate vested in Thomas Browne Skinner, and in such a case the provisions of Article 140 apply. It was, indeed, faintly contended by the appellant that the plaintiff claiming only an equity of redemption did not come within the meaning of a remainderman. It appears to their Lordships that so to hold would be to do violence to the language and reasoning of this Board in *Skinner v. Nannihal Singh* (1), in 1913, and would be inconsistent with the ordinary meaning of the term. Whether Thomas Skinner settled the estate subject to the incumbrance or whether he settled the equity in either case he created a contingent remainder which vested in the plaintiff in possession in 1919 on the death of the last of her brothers without issue. So far, therefore, as the defendant relies upon the enjoyment of the absolute title for 10 years* from the transfers from Lachman Das and his successors in 1898 and 1903 he is defeated by the provisions of section (Article ?) 140. It is unnecessary to add that if the transfer ultra the mortgage interest had taken place in the lifetime of Thomas Skinner, the settlor, so that time had begun to run in his lifetime, Article 140 would not have availed the plaintiff. This is in accordance with section 9 of the Limitation Act which itself follows the provisions of the English law. As it is, however, the defendant is defeated in his enjoyment of the absolute title by the provisions of Article 140. He then has to fall back upon the transfer to him of the mortgage interest of Lachman Das in the original mortgage of 1863 which, according to the decision

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(1) (1913) L. R. 40 I. A. 105; I. L. R. 35 All. 211; 17 C. L. J. 555.

* 10 years seems to be clerical error.—K. J. R.

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of the Privy Council in 1913, was *quoad tantum* transferred to him in the folds of the larger title which he thought he was getting. But if he has to rely upon a mortgage title then he must take it subject to the obligation of all mortgage titles, viz., the obligation to be redeemed. It is conceded and is plain that Article 134 does not protect the transferee of a mortgage by express transfer, and it appears to their Lordships idle to suppose that it protects a person who has taken a transfer only of a mortgage, but has taken it without his knowledge mistakingly supposing that he was getting something better in circumstances like the present, where he cannot maintain his superior title by reliance on any period of limitation. Resting as he does on the interest of mortgagee he is liable to be redeemed. The period of redemption began, it is true, in the lifetime of Thomas Skinner, and Article 140 has no application but the statutory period runs for 60 years and had not expired when the plaintiff filed the present suit. Their Lordships therefore are of opinion that this appeal should be allowed with costs here and below and the order of the Subordinate Judge restored, and that the case should be remitted to the High Court to make such additions to the decree as may seem just to the plaintiff in view of the fact that possession has been withheld from him and his testatrix since the date fixed in the preliminary decree. The right to possession will be governed by the preliminary decree with which, as their Lordships are informed, the plaintiff has complied. Their Lordships will humbly advise His Majesty accordingly.

Chapman, Walker & Shephard : Solicitors for the Appellant.

Douglas, Grant & Dold : Solicitors for the Respondent.

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Appeal allowed.

PRESENT : *Lord Shaw, Lord Warrington of Clyffe, Lord Atkin,
Sir John Wallis and Sir Lancelot Sanderson.*

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[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF THE NORTH-WEST FRONTIER PROVINCE.]

*Muhammadian Law—Marriage—Continuous cohabitation—Acknowledgment—
Presumption of marriage and legitimacy—Rebuttal of—Onus probandi.*

Where a child has been born to a father, of a mother where there has not been a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan Law, the presumption is in favour of such marriage having taken place : *Khajah Hidayat Oollah v. Rai Jan Khanum* (1) followed,

The law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years : *Indar Singh v. Thaker Singh* (2) referred to.

The legal presumption in favour of marriage is not weakened by evidence to the effect that there was a clan proclivity towards concubinage rather than marriage, nor by evidence that the woman was not a *parda nashin* lady. It is no part of the law of India that to have lived and to remain behind the *furdah* is a necessary part of a lady's legal marriage or a conclusive evidential fact.

In all cases in which marriage may be presumed by cohabitation, combined with other circumstances for the purpose of conferring upon the woman the status of a wife, it may also be presumed for the purpose of establishing paternity. If a man has acknowledged another as his legitimate child such acknowledgment raises a presumption both in favour of the marriage and of the legitimacy. The presumption is, of course, rebuttable, by proof either that the mother of the acknowledgee could not possibly have been the lawful wife of the acknowledger at any time when the acknowledgee could have been begotten, or that there was no such marriage in fact. Once the claimant son establishes a good acknowledgment of legitimacy in his favour, the marriage will be held proved and the onus rests on those who deny a marriage to negative it in fact. Wilson's Digest of Anglo-Muhammadian Law, sections 84 and 85, and *Habibur Rahman Chowdhury v. Altaf Ali Chowdhury* (3) referred to.

Appeal No. 53 of 1928 by the Plaintiff from a decree of the 24th January, 1927 of the Court of the Judicial Commissioner, North-West Frontier Provinces, Peshawar, (*Mr. H. Fraser*), setting aside a decree, dated the 14th April, 1925, of the Court of the District Judge, Kohat.

(1) (1844) 3 M. L. A. 295

(2) (1921) L. L. R. 2 Lah. 207.

(3) (1921) L. R. 48 I. A. 114; 33 C. L. J. 479.

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The main question for determination on the appeal to the Privy Council was whether the appellant, Mohabbat Ali Khan, was the legitimate son of one Khan Sahib Khushdil Khan, by Mussamat Babo.

The material facts of the case appear sufficiently from their Lordships' judgment.

On the question as to the plaintiff's legitimacy the two Courts in India differed. The District Judge decided that issue in the plaintiff's favour whilst the Appellate Court decided it in favour of the defendants.

The learned Judicial Commissioner said that the plaintiff's position was that his mother was legally married to Khushdil Khan about the year 1905, and that some time before he married her she and her mother had been working in the house as maid-servants. There was no documentary evidence of the alleged marriage of Mussamat Babo and Khushdil Khan, and the learned Judicial Commissioner came to the conclusion, on a consideration of the oral evidence, that the plaintiff had failed to establish the marriage by any direct evidence.

The learned Judicial Commissioner then considered the treatment of the plaintiff by his father and the members of his family in order to see whether their treatment would raise a presumption in favour of the plaintiff's legitimacy. He said:—"On behalf of the plaintiff it is contended that in view of the continuous cohabitation of Khushdil Khan with plaintiff's mother and the father's support of the boy, this treatment of him by the father and the father's family raises a presumption amounting to proof that the mother was the legally wedded wife of the father, as held by the District Judge. I have already pointed out, however, that where fathers have such a scant regard for the matrimonial tie, their treatment of their maid servants' offspring as sons raises no great presumption in favour of legitimacy".

DeGruyther, K. C., Parikh and Syed Aslam for the Appellant.

Dunn, K. C. and Wallack for the Respondents.

DeGruyther, K. C.: The *nikah* marriage of the appellant's parents is proved. There was no legal impediment to their marriage.

Dunn, K. C.: The Judicial Commissioner was right in holding that no presumption in favour of the plaintiff's legitimacy arises in this case.

(*Sir Lancelot Sanderson*: There is no evidence to show that the woman was a concubine.)

(*Lord Atkin* : The learned Judicial Commissioner says that in this particular family continuous cohabitation gives rise to no presumption of marriage.)

(*Sir Lancelot Sanderson* : In this case we have not only continuous cohabitation, but also acknowledgment and evidence of marriage. We have got to take them altogether. It is not a case of a mere continuous cohabitation, and we have to take into consideration the other facts also).

(*Lord Warrington* : Treatment as a son, if it is an open treatment and not secret, may amount to an acknowledgment.)

(*Sir Lancelot Sanderson* : It is quite obvious that acknowledgment of sonship is not sufficient. It must show that the acknowledgee intended to acknowledge the child as a legitimate son).

(*Lord Shaw* refers to Amir Ali's Muhammadan Law as to the *Purdah* system. *Purdah* is a very common practice and it has no legal sanction as evidence of marriage).

Dunn contends that the custom of *Purdah* has for centuries been strictly observed by all Muhammadans except the poorest. See the judgment of Mr. Justice Rafi q, in *Jamiluddin v. Abdul Majeed* (1) a case from the N. W. Provinces.

(*Lord Shaw* refers to Wilson's Anglo-Muhammadan Law, page 61, under the heading "The *Purdah* System", and reads from the passage commencing, "In most Muhammadan communities the legal freedom of women is, to some extent, nullified in practice among the upper classes by the fashion of seclusion")

(*Lord Warrington* : *Purdah* is a social institution, not a legal system.)

(During the argument on the *Purdah* question, *Lord Atkin* emphasized the fact that the Trial Judge, who decided in favour of the marriage, was himself a Muhammadan).

DeGruyther, K. C., replied : As to the essentials of a valid *nikah*, see Amir Ali's Muhammadan Law, Vol. II page 283, section 3, Chapter 6, (4th edition).

The mere absence of a deed of dower would not indicate that there was no marriage.

In the course of the argument, reference was made to the following authorities :—

Khajah Hidayat Ollak v. Rai Jan Khanum (2); *Habibur Rahaman Chowdhury v. Altaf Ali Chowdhury* (3); *Sadiq Husain*

(1) (1915) 13 A. L. J. 361.

(2) (1844) 3 M. L. A. 295.

(3) (1921) L. R. 48 I. A. 114 : 33 C. L. J. 479.

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Khan v. Hashim Ali Khan (1); *Imambandi v. Mutsaddi* (2);
Jamiluddin v. Abdul Majid (3); *Musaelun Babes v. Omdah Babes* (4).

Their Lordships' judgment was delivered by

Lord Shaw : This is an appeal from a decree of the Judicial Commissioner for the North-West Frontier Province dated the 24th January, 1927, which set aside a decree dated the 14th April, 1925, of the Court of the District Judge, Kohat. The District Judge had decreed that the appellant is the legitimate son of one Khan Sahib Khushdil Khan. The Judicial Commissioner reversed this judgment and dismissed the plaintiff's suit.

The plaintiff was born in 1906. It is not disputed that he is the son of Khushdil Khan by Musammat Babo. Various questions were raised in the case, but the only point remaining for determination in this appeal is whether the appellant is the legitimate son of the Khushdil Khan, that depending upon whether Khushdil and Musammat Babo were married persons.

In August and September, 1923, Khushdil had serious attacks of illness, accompanied by paralysis and aphasia. While still suffering from these diseases he, on the 2nd April, 1924, executed a deed of gift by, as was alleged, making his thumb impression upon the deed after the provisions thereof had been carefully explained to and assented to by him.

This part of the case drops out, both Courts below having concurred in finding that Khushdil was proved to have been mentally incapable of understanding the deed on account of his illness, and that the deed was therefore invalid.

The remaining part of the suit, however, is head 1 of the plaint, which asks the Court to pronounce a declaratory decree "that plaintiff is the lawful son of the said Khan Sahib Khushdil Khan," and upon this the Courts below have differed. If the plaintiff is the lawful son he is the sole male heir of Khushdil and the property rights in the deceased's estate would be regulated accordingly.

The question whether Khushdil and Musammat Babo were married is one of fact, and as such was investigated and has been summarized with the utmost care by the District Judge. A most important part of the case attempted to be made by the respon-

(1) (1916) 1, L. R. 38 All. 627; L. R. 43 I. A. 212; 25 C. L. J. 363.

(2) (1918) 1, L. R. 45 Calc. 878; L. R. 45 I. A. 26; 28 C. L. J. 409.

(3) (1915) 13 A. L. J. 361.

(4) (1868) 10 W. R. 469.

- dents was that such a marriage was legally impossible because at the time of the marriage, and the birth of the appellant, the lady was already married to one Ilyas. The respondents plead that "her husband Ilyas died six or seven years ago and she was bound to him by *nikaḥ* up to that time." Had this been established it would, of course, have been a complete answer to the appellant's suit. Both Courts below, however, have agreed that there was no such marriage, and that the body of evidence produced to that effect is altogether untrustworthy. As the District Judge puts it, "the story that" Ilyas was married to Musammat Babo is fictitious."

What remains accordingly is of a limited scope. But it must be observed that the witnesses denying the marriage of Musammat Babo with Khushdil are very largely the same persons who allege the fictitious story of her marriage with Ilyas. This circumstance does not seem to have had attached to it by the Judicial Commissioner the weight which was its due.

It is unnecessary for the Board to recapitulate in detail the evidence given in the case. They are satisfied that the conclusion upon that evidence, oral and documentary, and taken as a whole, by the District Judge, was sound.

Was there a *nikaḥ* ceremony? It is in evidence that it was solemnised by Imam, who is one of the witnesses: a cousin of the bride, now dead, acted as *padar vakil*, that is agent for the bride. Two others who acted as the required witnesses are also dead. Three other persons have given evidence in support of the marriage. It is possible to criticise with much effect such oral evidence, but fortunately the case does not stand upon this alone. The life history of the parties has to be considered.

Upon that there can be no doubt that Khushdil, the father, acknowledged Mohabbat Ali Khan, the plaintiff, as his son, and this in circumstances which were clearly equivalent to an affirmation that he was a legitimate son. Shortly after the boy's birth, namely, in August, 1906, Khushdil Khan stated on oath that he had got a son. This meant the appellant, who was his only son at the time. Further, the son and his mother lived in family with Khushdil, and continued to do so from his birth in 1906 to the date of Khushdil's death in 1925. The circumstances of the family were these. Before the marriage to Musammat Babo, Khushdil Khan had already married thrice, but about the year 1903 only two of his wives were alive. By one of these wives he had one daughter. There were also born to him two sons

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by another of his wives, but they died before 1904, and he had only a daughter alive. As the Judicial Commissioner says in his judgment :—

"It seemed unlikely that he would beget a son from any of his existing wives, and in a desire to have male offspring he may well, argues counsel for plaintiff, have turned to a maidservant of of his own household in the hope of obtaining it; there would, therefore, have been nothing unnatural in a marriage between the two."

The argument, the learned Commissioner thinks, is far from convincing, and he refers to a certain view which he entertains as to the practice of other members of the family than Khushdil. To that allusion will be subsequently made.

These being the domestic facts, it is not questioned that the appellant and his mother lived continuously in the deceased's house, and the appellant was brought up as one of his family. One fact in particular may be alluded to. When the boy reached school age a notable circumstance is that Khushdil signed an application to the Headmaster, Government High School, Kohat, saying :—

"Sir,

"I request you to kindly admit my son Mohabbat Ali in the school. The necessary information is given on reverse (below).

"I herewith produce the School Leaving Certificate. I hereby declare that he has not been admitted so far in any recognised school."

The appended information includes the following :—

"Date of birth—1st January, 1906.

"Father's name—Khushdil Khan, Rais, Kohat.

"Caste or tribe—Mussalman, Afghan, Izrat Khel."

This is signed by Khushdil in his own hand, giving the particulars of his own son and his own tribe, the date being 11th April, 1919. Two years later a leaving certificate is given that "Mohabbat Ali Khan, son of Khan Sahib Khushdil Khan, attended the Government High School, Kohat District, from 11th April, 1919, to 1st April, 1921." This certificate was applied for by Taj Mohammad Khan, a cousin of Khushdil, and in the application he referred to the appellant as "my brother's son, Mohabbat Ali Khan."

Further a number of transactions relating to land, and in revenue records, appear from documents produced, in which the appellant is described by Khushdil and his relatives and others

as "Khushdil's son." The documents have been produced, and they are referred to in detail in the judgment of the District Judge; it is sufficient to say that they appear to demonstrate with clearness both the sonship and the legitimacy of the appellant. The father took much interest in his upbringing, and there are letters between both the father and the son on the one hand, and other members of the family on the other, showing that the interest in his upbringing and education was shared by these relations. Throughout the transactions and correspondence referred to, no suggestion of any kind appears to the effect that Mohabbat was illegitimate. The entire body of facts is confirmatory of his legitimacy.

The law applicable to such a case is quite settled. As Dr. Lushington, delivering the judgment of the Board, observed in *Khajak Hidayat Oallah v. Rai Jan Khanum* :—

"where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan law, the presumption is in favour of such marriage having taken place."

According to Sir R. K. Wilson's "Digest of Anglo-Mohamedan Law," section 84 :—

"In all cases in which marriage may be presumed by co-habitation combined with other circumstances for the purpose of conferring upon the woman the status of a wife, it may also be presumed for the purposes of establishing paternity."

Section 85 may be also quoted :—

"If a man has acknowledged another as his legitimate child the presumption of paternity arising therefrom can only be rebutted by (to confine the instances to the one relevant) . . . (d) proof that the mother of the acknowledgee could not possibly have been the lawful wife of the acknowledger at any time when the acknowledgee could have been begotten."

Evidence upon this last head was, as already mentioned, admitted under the allegation that the appellant's mother was married to Ilyas, but proof of the allegation completely failed.

The present case accordingly is one of an acknowledgment by the father, an acknowledgment which involves the assertion that he, the father Khushdil, was married to Musammat Babo, the appellant's mother. Such acknowledgment undoubtedly

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raises a presumption in favour of the marriage and of the legitimacy,

The presumption is no doubt rebuttable, and if there is proof *abundant* on the subject to the effect that there was no such marriage in fact, the same position is reached as if no such marriage had been possible. A recent instance of positive disproof of the marriage was *Habibur Rahman Chowdhury v. Altaf Ali Chowdhury* (1). As Lord Dunedin put it :—

"Such acknowledgment in face of the fact that there was no marriage is of no avail,"

and the general law was summed up in the same judgment as follows:—

"A claimant son who has in his favour a good acknowledgment of legitimacy is in this position: the marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact."

It would accordingly appear clear that it rests upon the respondents in this case to establish that there was no marriage.

It might not be considered necessary to enter into any question of presumption of proof, as their Lordships find themselves in agreement with the District Judge to the effect that the marriage is proved; and they do so on a broad induction of the oral and documentary evidence as a whole. But their Lordships think it expedient to deal with the reasons which have induced the Judicial Commissioner to differ from the District Judge. He correctly says :—

"The law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years. There is ample authority for this position, which will be found cited in a ruling of the Lahore High Court, *Indar Singh v. Thakar Singh* (2)."

* * * *

He then proceeds as follows :—

"The strength of the presumption, however, will obviously vary according to the circumstances of each particular case, and the habits of the *Izzat Khel* clan in the matter of concubinage with maidservants and slave girls can scarcely be described as nor-

(1) (1921) L. R. 48 I. A. 114; 33 C. L. J. 479.

(2) (1921) I. L. R. 2 Lah. 207.

mal. We know of four certified cases of sons born of slave girls (*hanisakadas*). These are Mawaz, son of Sharbat ; Manawar, son of Ata Mohammad Khan ; Khushal, son of Nawab Bahadur Sher Khan ; and Abdul Rahman, grandson of Nawab Bahadur Sher Khan. It is on the record, or has been held by the Courts, that Mawaz was the only one of these four whose father entered into a lawful marriage with his mother. The other three were the offspring of concubines outside wedlock. The names of other *hanisakadas* have been mentioned ; so that there are at least four and probably several more of such cases amongst the immediate descendants of Sher Ali Khan, *i. e.*, the family with which we are now concerned. The presumption in favour of legitimacy arising from continuous cohabitation over a period of years is one which is based on public policy, and in the case of Muhammadans, no doubt, on the well-known doctrine of Muhammadan law, which abhors bastardy. In a family like the present, however, which pays scant regard to the matrimonial tie in the begetting of children from women of low caste, the presumption, in my opinion, must be so small as to be practically negligible. It might operate as a factor to turn the scale where the evidence for and against a marriage is equal, but it is not sufficient to transfer from a claimant son some obligation to prove his own legitimacy. So the burden of proof may be regarded as being equally distributed over the parties."

The Board think it right to say at once that it can give no countenance to the doctrine here set forth. It amounts to this, that the proof as to whether there was a marriage between two parties is to include a consideration of the character and conduct of various relatives ; an estimate is to be formed as to whether on the whole these relatives prefer the tie of concubinage to that of marriage. The suggestion further appears to be : that the facts of the particular case, in which evidence is given pro and contra bearing upon the issue of marriage, are not to be regulated by the well-known presumptions of law, but that these presumptions are to be wiped out by reason of the conduct and mode of life and predilections of other persons. Each case of each of these relatives would have required to be separately investigated on its own merits : without that, the way is opened for family gossip on a wide scale, prompted by motives unknown and knowledge untested.

A further suggestion of which their Lordships cannot approve appears to amount to this : that a Court of law on evidence such

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as is given here would pronounce a view to the effect that there was a clan proclivity towards concubinage rather than marriage, and therefore that marriage and the legal presumptions in favour of it cannot be sustained.

Their Lordships think it right further to say that the evidence on this subject should not have been allowed by the District Judge. He attached no weight to it himself, but it was not only without weight, it was without competence.

It remains to be added that undoubted difficulty arises in the case on account of the fact that the mother of the appellant was not a *pardah nashin* lady. The other wives lived behind the *pardah* according to the well-known Mohammedan habit. They were strict Mohammedans, young persons brought from Afghanistan. The third wife, Musammat Babo, had been in fact a maidservant and housekeeper in the household of the deceased. When the marriage took place she continued her duties in the household and was not *pardah nashin*. Even if that had involved or recognised a lack or disregard of social status, these things were essentially matters for herself and her husband to consider. But it is no part of the law of India that to have lived and to remain behind the *pardah* is a necessary part of a lady's legal marriage or a conclusive evidential fact. It is a circumstance to be considered when the fact of the marriage is in issue. But that issue is to be determined on a broad conspectus of the whole situation, including of course the *pardah* item. In the present case, it is by no means sufficient to interfere either with the presumptions of law or the balance of the proof of fact.

Their Lordships will humbly advise His Majesty to allow the appeal and to restore the judgment of the District Judge; the costs of the case from that date, that is to say, in the appeal to the Judicial Commissioner and to His Majesty in Council, to be paid by the respondents.

T. L. Wilson & Co.: Solicitors for the Appellant.

S. L. Polak: Solicitors for the Respondents.

K. J. R.

Appeal allowed.

PRESENT : *Lord Shaw, Lord Tomlin and Sir Lancelot Sanderson.*

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v.

TAN GUAT TEAN AND OTHERS.

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Registration—Indian Registration Act (XVII of 1908), Secs. 17 (1) (b), 49—Equitable charge upon immoveable property—Compulsory registration—Effect of non-registration.

A document creating an equitable charge upon immoveable property comes within the purview of section 17 (1) (b) of the Indian Registration Act, 1908, as creating a right, title or interest over immoveable property, and is, therefore, compulsorily registrable, and if not registered, no charge can in law be created by it, (vide section 49 of the Act) : *Dyal Singh v. Indar Singh* (1) referred to.

Appeal No. 65 of 1928 by the Plaintiff, from the judgment and decree, both dated the 20th April, 1926, of the High Court of Judicature at Rangoon on its Appellate side (*Ruledge C.J.* and *Maung Ba, J.*) setting aside a decree dated the 8th May, 1925, of the same High Court in its Original jurisdiction (*Maung Gyi J.*).

For the purposes of the present report the material facts of the case are set out sufficiently in their Lordships' judgment.

The main question for determination on the appeal to the Privy Council was whether the appellant, a creditor of the estate of a deceased insolvent, was entitled to have his debt charged on the immoveable property of the said insolvent. The Trial Court decided in the affirmative. The Court of Appeal reversed the decision and held that the appellant could not claim a charge.

The learned Judges of the Court of Appeal, in allowing the appeal, made the following observations in their judgment :—
"The law seems to be simple enough. In section 54 of the Transfer of Property Act it is laid down that a contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms between the parties, and that such a contract does not of itself create any interest in or charge

(1) (1926) L. R. 53 I. A. 214 ; 44 C. L. J. 97.

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on such property. We may point out that this law is a distinct departure from the English law under which the purchaser by virtue of the contract of sale becomes in equity the owner of the property from the date of the contract. So this principle of English law has no application to places where the Transfer of Property Act is in force: (I. L. R. 44 Cal. 542, P. C.). The other point we have to consider is whether Khoo Sain Ban can claim any benefit under clause 6 (b) of section 55. Under that clause a buyer is entitled unless he has improperly declined to accept delivery of the property to a charge on the property as against the seller and all persons claiming under him with notice of the payment to the extent of the seller's interest in the property for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount. What do we find here? The first contract was to convey the property in satisfaction of debts amounting to nearly half a lakh. But subsequently another small piece was accepted valued at Rs. 15,000, in part payment of the debts. The learned Judge held and we agree with him that that contract no longer existed. In the absence of a contract for sale we fail to see how any of the rights and liabilities of buyer and seller under section 55 can be enforced. For the above reasons the learned Judge was wrong in declaring a charge in respect of the balance of debt on the suit property."

Lowndes K. C. and *Kenelm Pridy* for the Appellant.

Dunn K. C. and *S. Hyam* for the Respondents.

Lowndes K. C.: The appellant was entitled to specific performance or in any event to a charge as held by the Trial Court.

Dunn, K. C. for the Respondents: The document created no legal charge on the property in question. Refers to section 17 of the Indian Registration Act, and the "Explanation" added by Act No. II of 1927, as regards an agreement for sale.

(*Lord Tomlin*: The recital of payment of the earnest money, etc., *qua* recital may not require registration, but there may be something else, which may bring it within the scope of the section).

Refers to Lord Dunedin's judgment in *Dayal Singh v. Indar Singh* (1) and to the "explanation" since enacted in section 17 of the Registration Act.

The intention of the Legislature in enacting the new Explana-

(1) (1926) L. R. 53 I. A. 214; 44 C. L. J. 97.

- tion was that a party shall not be deprived of the right to obtain specific performance, although the document created a charge. The document in the present case was not a contract of sale within the "Explanation".

Lawndes, K. C. in reply : What we have sued for is, specific performance of the document, asserting that it is an agreement of sale. Supposing your Lordships hold it is not an agreement of sale, but an agreement to liquidate the debt out of the property, it amounts to an agreement to mortgage; and why should the appellant not have a decree for specific performance of the agreement of mortgage ?

(*Lord Tomlin* : Does it require registration ?).

No. : an agreement of mortgage never requires registration.

(*Lord Tomlin* : Does not an agreement of mortgage create a charge and so require registration ?).

(*Sir Lancelot Sanderson* refers to section 17 of the Indian Registration Act).

The question is, does the document here create, in itself, an interest in immoveable property.

(*Lord Tomlin* : In English law, it is clear that the document would create an equitable charge. Is the law in India different ?)

(*Sir Lancelot Sanderson* : Section 17 (a) (5) of the Registration Act may possibly take it out of the statute).

We have purely a statutory right in India.

(*Lord Tomlin* : With regard to contract of sale, there is now an express provision made by the new Act of 1927, but no similar provision is enacted in regard to an agreement to mortgage).

(*Lord Shaw* : What is your position ? Do you ask for specific performance of contract of sale or contract of mortgage ?)

I submit that it is the agreement of sale of which we claim specific performance. That has been our case throughout.

(*Lord Shaw*, after referring to the plaint, observed : You are asking for a declaration of charge and not for specific performance of any agreement to sell. In the plaint you do not refer to it as an agreement of sale. In your very first prayer, you ask for a declaration of charge).

We are anxious to have specific performance of the agreement to sell.

Refers to *Dayal Singh's case* (1), which held that an agreement of sale required registration. That was a very unfortunate decision,

(1) (1926) L. R. 53 L. A. 214 ; 44 C. L. J. 97.

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because it was an appeal from the Punjab, and it was erroneously assumed that the Transfer of Property Act applied.

(*Sir Lancelot Sanderson* : The appeal was argued *ex parte* and the learned counsel was not aware that the Act was not in force in the Punjab).

To meet the difficulty created by *Dayal Singh's* case (1), Act No. 11 of 1927 was passed. The new explanation says that "the document shall not be deemed to require or ever to have required registration."

(*Lord Tomlin* : The effect of the new Act is to wipe off that Privy Council judgment).

Section 55 (6) (b), Transfer of Property Act, gives the buyer a charge, and the Act of 1927 lays down that the document, though it creates a charge, does not require registration. I submit that if your Lordships hold that the document in the present case does confer a charge, then according to the Act of 1927, such a document *never* did require registration. The "Explanation" says that when a document is nothing but an agreement to convey and recites that the whole or part of the purchase money has been paid in advance, that document shall not require registration. The fact that section 55 (6) (b) operates to give the buyer a charge, will not render the document compulsorily registrable.

During the course of the argument, the following authorities were cited at the Bar :

Maung Skwe Goh v. Maung Inn (2) ; *Lalchand Motiram v. Lakshman* (3) ; *Vesey v. Rashleigh* (4) and *Dayal Singh v. Indar Singh* (1).

Their Lordships' judgment was delivered by

March, 11.

Lord Shaw :—This is an appeal from a decree of the High Court at Rangoon made in its Appellate Jurisdiction on the 20th April, 1926. It reversed a decree of the same Court made in its Original Civil Jurisdiction on the 8th May, 1925. In the case for the appellant the point to be decided is thus stated "The principal question in this appeal is whether the appellant is entitled to a charge upon certain property in Rangoon known as 'Mount Pleasant' as was found by the Trial Court or only to a money decree as held by the Court of Appeal."

It is unnecessary to repeat the facts of the case antecedent to the 2nd August, 1923. They are stated with sufficient particularity

(1) (1920) L. R. 53 L. A. 214 ; 44 C. L. J. 97.

(2) (1916) I. L. R. 44 Calc. 542 ; 25 C. L. J. 108.

(3) (1904) I. L. R. 28 Bom. 466. (4) [1904] 1 Ch. 634.

in the cases for the parties and in the judgments of the Courts below.

One Lim Chin Tsong, a Chinese resident in Burma, had acquired in 1909 a small plot of land of 1'871 acres in extent, part of "the Golden Valley Estate" in the district of Rangoon. In 1919 he also purchased two other properties, one of which was a house and land known as "Mount Pleasant"—the subject matter of the present suit. Lim Chin died on the 2nd November, 1923. There had been a variety of business transactions between him and the appellant Khoo Sain Ban.

Some months before his death in November, namely on the 2nd August, 1923, Lim Soo Hean & Company, being the firm of which Lim Chin was the sole partner, gave to the appellant the document :—

Rangoon, 2nd August, 1923.

DEAR SAIN BAN,

I confirm that we owe you nearly half a lakh of Rupees, I shall convey you my property known as "Mount Pleasant" as agreed by me to liquidate the amount as soon as I feel a little better.

(Sd.) LIM SOON HEAN & CO.

The argument before the Board had reference to the proper construction of that instrument.

In 1924 his widow, the respondent No. 1, obtained letters of administration, and she executed in April of that year a registered deed in favour of the appellant transferring to him the first small plot of land mentioned, and the appellant Sain Ban accepted the said transfer as "in part satisfaction of" his debt which was stated to be Rs. 52,734. The price of the plot was Rs. 15,000, leaving a balance of Rs. 37,734 still due. In June, 1924, the estate was placed for administration in insolvency and the respondent No. 2 was appointed official assignee.

In September the appellant filed a claim as a creditor on the estate as per an account which included two sums of Rs. 1,000 and Rs. 2,300 said to have been advanced to respondent No. 1 after her husband's death. In that account the Rs. 15,000—the value of the small property transferred—is clearly credited and the final balance of Rs. 43,533 is followed by this statement :—

"This amount is covered by property known as Mount Pleasant with 7'92 acres freehold in "Golden Valley." "

It is accordingly fairly plain that the appellant and his advisors viewed the transaction to be presently noted, as security, or cover for, or charge, upon "Mount Pleasant." The view, however,

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pressed upon the Board was of a more radical character, viz., that the document fell to be construed as a still existent agreement for sale of which specific performance may be demanded at law.

The second "reason" for the appellant is :—

"the appellant was entitled to specific performance or in any event to a charge as held by the Trial Court."

By specific performance can only be meant a performance of this obligation, "I shall convey you my property known as 'Mount Pleasant.'" As has been shown subsequent to the execution of that document, the appellant had accepted a property valued at Rs. 15,000 in part satisfaction of the obligation of 2nd August and in part payment of the sum due to him, and had in fact credited that part payment accordingly. To grant specific performance would accordingly be to vest the property fully in the appellant in respect of an obligation which had been in considerable part extinguished. According to one argument laid before the Board the appellant would have been permitted to realise the property and he would then stand in the position of a debtor to the estate of the vendor should more be obtained than was necessary to cover the remnant balance.

In the opinion of their Lordships, looking to the facts of the transaction, specific performance of the obligation cannot be given or worked out on any such principle. On the general point of construction of the document taken as a whole there are two views. It may be argued for as an obligation to grant an out and out transfer, liquidating the amount due in the sense that no debt remained between the parties, the property having been given and accepted in complete liquidation, that is to say in the sense of complete extinguishment of any existing debt. Difficulties might have arisen as to this construction and as to its possible application to a position of affairs in regard to a property in respect of which Rs. 15,000 had been accepted in part satisfaction for the debt for which the land had been (as alleged) agreed to be sold. Their Lordships are of opinion that in the circumstances a decree for specific performance of the contract by conveyance of the property cannot be granted, and that the judgment of both of the Courts below on that topic is right.

The other view, however, is that, granted the payment of Rs. 15,000 as stated, the document as it stands provides sufficient grounds for an equitable charge upon the property, to the effect of enabling the appellant to rank as a secured creditor

- (he is of course an ordinary creditor) upon the estate of the grantor, now in liquidation. The first Court thought that it did; the High Court thought that it did not, upon reference to sections 54 and 55 (6) of the Transfer of Property Act. Their conclusion was that "In the absence of a contract of sale we fail to see how any of the rights and liabilities of buyer and seller under section 55 can be enforced."

The Board agrees with the result reached by the High Court, but thinks that the case can and ought to be disposed of in accordance with certain statutory provisions of the Indian law, to which the attention of the Court below may not have been called.

It must be remembered that the title deeds of the property were not handed over and no question of security, charge or lien on that ground arose. The claim of the appellant arises solely upon the document, and is of the nature of an equitable charge. Such a charge can only found a claim in law if the provisions of section 17 of the Registration Act, 1908, are complied with. The provision is as follows:—

"17 (1) The following documents shall be registered.....(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immoveable property."

It is plain that the document founded upon this record is one alleged to create a right, title or interest over immoveable property. Such a document, it is declared "shall be registered."

Further by section 49 it is provided as follows:

"No document required by section 17 to be registered shall—

"(a) affect any immoveable property comprised therein, or

"(b) confer any power to adopt, or

"(c) be received as evidence of any transaction affecting such property or conferring such power unless it has been registered."

These sections were applied in *Dayal Singh v. Indar Singh* (1) with a reference to the antecedent legislation and the provisions of the Registration Act were, of course, given effect to.

In the result accordingly, their Lordships are of opinion that the document was compulsorily registrable, that it was not registered, and that no charge can accordingly be created by it.

(1) (1926) L. R. 53 I. A 214; 44 C. L. J. 97.

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It is unnecessary to proceed to the further general ground referred to in the judgment of the High Court.

Their Lordships will humbly advise His Majesty that the appeal fails with costs against the appellant.

Stonham & Sons : Solicitors for the Appellant.

Barrow, Rogers & Nevill : Solicitors for the Respondents.

K. J. R.

Appeal dismissed.

FULL BENCH.

Before Sir George Claus Rankin, Knight, Chief Justice, Sir Charu Chunder Ghose, Knight, Judge, Sir Zahid Sukrawardy, Knight, Judge, Mr. Justice, M. N. Mukerji and Mr. Justice, Jack.

PADAM PROSAD UPADHAYAYA.

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CRIMINAL.

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July, 3.

Misdirection—Review under Cl. (25) of the Letters Patent—Opening for the prosecution, what to contain—Introduction of highly prejudicial matters to the notice of the jury—Reading of petition of complaint in former proceeding between the parties under another section of the Penal Code (Act XLV of 1860)—Certificate of birth, if forged—Verdict of jury, when can be set aside—Letters Patent, Cl. (26), scope of—"Review the case"—Delay—Limitation Act (IX of 1908), Sch. I Art. 162.—Topics of prejudice connected with the character of the prisoner—Grave omission to direct the jury on vital point, if can be made good by counsel's calling attention to it—Evidence Act (I of 1872), Secs. 9, 11, 80, 167—Evidence entirely circumstantial—Demeanour of witness—Contemporaneous interpretation—Defective charge—Conviction, if can be set aside.

Per Rankin C. J. (Sukrawardy and Mukerji J.J. concurring) : So far as criminal cases are concerned, the opening for the prosecution ought always to be confined to matters which are necessary to enable the jury to follow the evidence when it is brought before them. This is not the stage of a case at which doubtful questions of admissibility should be either raised or decided. Whether a document is admissible or not is a matter which should always be ruled upon

*Application for review under section 26 of the Letters Patent, against the decision of Mr. Justice Jack at the High Court Sessions, dated the 9th January, 1929.

at the time the document is being proved or put in or the question asked of the witness. In many cases a thing may be good evidence at one stage of the case and inadmissible at another. It is frequently necessary to give evidence to lay the foundation which justifies a question or the putting in of a document. The opening speech of the counsel for the prosecution does not afford a proper occasion for the determining of such questions.

The verdict of the jury cannot be allowed to stand unless the High Court in review under clause 26 of the Letters Patent be of opinion that the same verdict would have been arrived at had they been correctly and sufficiently directed : *R. v. Panchu Das* (1). It is not open to direct retrial in such a case.

The phrase "to review the case" as used in clause 26 of the Letters Patent applies as much where a point of law is reserved by the trial Judge as where the Advocate-General has given a certificate. Inordinate delay may be a matter for consideration by the Advocate-General at the time when he is called upon to consider whether a certificate should be granted. This dealing under clause 26 of the Letters Patent is not a dealing with an application for review of judgment within the meaning of article 162, Sch. I of the Limitation Act.

Per C. C. Ghose, J. : Under clause 26 of the Letters Patent, the trial Judge may reserve a point of law or points of law for the opinion of the High Court or the Advocate-General may certify that in his judgment there is an error in the decision of a point or points of law decided by the trial Judge or that a point or points of law which has or have been decided by the trial Judge should be further considered. The Court then reviews the entire case or such part of it as may be necessary and finally determines such point or points of law reserved or certified as the case may be and 'thereupon' may alter the sentence passed by the trial Court and pass such judgment and sentence as shall seem right to the Court. The word 'thereupon' has been construed to mean that the determination of the point or points of law reserved or certified must be in favour of the prisoner before the Court can interfere with the conviction and sentence. If it be found that the opinion of the trial judge on the point or points reserved or certified cannot be supported, it is not open to High Court to direct a retrial. The Court has, no doubt, power under Cl. (26) of the Letters Patent to examine the evidence and determine for itself whether after the exclusion of the evidence or matter which may be considered inadmissible, the residue on the record is sufficient to justify the conviction. The Court will not substitute its own finding for the verdict of the jury and it must consider whether the evidence or matter improperly admitted was of such a nature that it possibly may have considerably influenced the minds of the jury and whether it was reasonably certain that the injury would, not might, have acted on the unobjectionable evidence, if the wrongly admitted evidence or matter had not also been presented to them. Section 537 of the Code of Criminal Procedure has no application to a case under Cl. (26) of the Letters Patent : *Emperor v. Fatch Chand* (2) (per Mookerjee J.). Contrary view taken by Rankin, J in *Emperor v. Mackay* (3) not approved.

Per Jach J. : The High Court under Cl. (26) of the Letters Patent is to

(1) (1920) 1 L. R. 47 Calc. 671 ; 31 C. L. J. 408.

(2) (1916) 1 L. R. 44 Calc. 477 (503) ; 24 C. L. J. 400 (423).

(3) (1926) 30 C. W. N. 276 (285) ; 43 C. L. J. 311 (319).

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review the entire case or such part of it as may be necessary, and finally determine the point or points of law reserved or certified and therefore may alter the sentence passed by the trial Court and pass such judgment and sentence as shall seem right to the Court. A statute must be taken to mean what it says, and if the words of the statute be plain and clear, it is not for the Court to raise any doubt as to what they mean. The Court can on review, examine evidence for itself and determine without reference to the probable verdict of a jury, whether, excluding the inadmissible evidence, the residue is sufficient to justify the conclusion. The Legislature intentionally provided that the Court should be unhampered by technicalities and any attempt to introduce restrictions on the powers of the Court where there is none in the statute is to be deprecated. If the Court is convinced on the evidence that the accused is guilty he should not be acquitted merely on account of a defective charge.

Per C. C. Ghose J. It is a rule of universal application that in a criminal trial counsel for the prosecution in opening the case to the jury, can only state ~~all~~ that is proposed or intended to prove in the case, so that the jury may see if there is any discrepancy between the opening statements of counsel and the evidence afterwards adduced in support of them and it is wholly improper for counsel for the prosecution to open any matter to the jury in respect whereof no evidence is intended to be or can be adduced at the trial.

Very great care must be taken by counsel for the prosecution in the observations he makes to the jury: *R. v. Redland* (1), and that topics of prejudice connected with the character of the prisoner should be carefully excluded: *R. v. Bloom* (2). The fiction of law in criminal cases is that the Judge is counsel for the prisoner: *R. v. Wakefield* (3). The counsel for the prosecution ought not to struggle to obtain a conviction, but should regard himself rather as minister of justice, assisting him in its administration than as advocate: *R. v. Banks* (4).

(*Jach J. Contra.*) A grave omission to direct the jury on a vital point cannot be made good merely by counsel's calling attention to it at the termination of the summing up: *R. v. Willst.* (5).

Per C. C. Ghose J. Section 80 of the Evidence Act does not deal with the question of admissibility of documents referred to therein, but simply dispenses with the necessity of their formal proof by raising the presumption that everything in connection with them had been legally and correctly done; that is (i) that the documents purporting to be record of evidences or statements or confessions are genuine; (ii) that the statements as to the circumstances under which they were taken, made by the officer who affirmed his signature, are true and (iii) that the evidence, statement or confession was duly taken.

Per Jach J. The unanimous verdict of the jurors should not be set aside on the mere speculation that certain allegations might have influenced them to some extent when it is clear that the verdict is entirely justified by the evidence.

Section 167 of the Evidence Act is imperative and applies to any decision

(1) (1865) 4 F. & F. 495.

(2) (1910) 74 J. P. 183; 4 Cr. App. Rep. 30.

(3) (1799) 27 St. Tr. 679.

(4) (1916) 2 K. B. 621.

(5) (1928) 16 Cr. App. Rep. 146.

In any case, and therefore necessarily to the decision of the High Court when exercising its powers under Cl. (26) of the Letters Patent.

Where the evidence is entirely circumstantial, no importance is to be attached to the demeanour of the witnesses, and the Judges on review under Cl. (26) of the Letters Patent can decide on the evidence as to the guilt of the accused.

A contemporaneous interpretation is the best and strongest in law.

One P was tried in the High Court Sessions on charges laid under sections 193 and 471 of the Indian Penal Code. On the 19th March 1927 a Nepali girl R filed a complaint to the Magistrate charging P with diverse offences and in particular with the offence of having sold her to H for immoral purposes. She alleged that she was of the age of about 14 years and asked that process issue against the accused under section 372 Indian Penal Code. On the 6th August, 1927, the Magistrate acquitted the accused. The case for R at the High Court Sessions was that P in the course of the trial before the Magistrate had filed and made use of a document purporting to be a certified copy of an extract from the daily register of births of the year 1908 kept in Thana Dasaswamedh, Benares, with a view to show that the girl was over the age of 18 years at the time at which it was alleged that she had been sold; and that at the time when the document was filed and used as aforesaid it had been altered in four places—in two places 1909 had been altered to 1908 and in two places the name "Babar" had been inserted in front of the names of "Jung Bahadur," the effect of the forgery being that whereas the genuine entry recorded the birth as on the 19th June, 1909, and the father as being Jung Bahadur, the document as forged showed the date of birth as the 19th June, 1908, and the father as Babar Jung Bahadur.

The counsel for the prosecution insisted upon reading to the jury in his opening the whole of R's petition of complaint against P in the section 372 case. The petition alleged against P various highly prejudicial matters—that he was a man of loose morals, that he was notorious for seducing Nepali girls, that he used to keep such girls as concubines, that he had assaulted and raped the complainant on diverse occasions. This petition was allowed to be read as whole:

Held, per curiam (Jack, J. contra) that the trial was vitiated by the admission in evidence of R's complaint in the case under section 372 Indian Penal Code and by the omission to warn the jury not to be influenced by the allegations therein against the accused.

The allegations in the petition of R were such as must have influenced the jury against the petitioner at the very beginning of the trial.

Per Rastin, C.J. (Sukrawardy and Mukerji, JJ. concurring): That the petition of complaint of R was a document which the prosecution were entitled to put in but the whole of it should not have been read to the jury.

Though the jury should know that the proceedings before the Magistrate were proceedings upon the charge of selling a minor girl for immoral purposes, the other allegations had, *prima facie*, no bearing upon the question whether the certificate of birth was forged or not and if so, whether this was known to P.

That the counsel for the prosecution should not have been allowed to read to the jury the entirety of R's petition of complaint dated the 19th March, 1927 and that procedure adopted by the prosecution was wholly wrong and un-

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justifiable inasmuch as the petition of complaint was not tendered in evidence and consequently the petitioner was deprived of the opportunity of cross-examining R on the statement made by her in the said petition of complaint and of removing from the minds of the jury the unfavourable impression that must have been created by the reading of the petition of complaint.

Per C. C. Ghose J. : If the sole object of the prosecution in placing the petition of complaint of R before the jury was to draw attention to the fact that she had stated therein that she was 14 years of age, it was a grave error on the part of the counsel for the prosecution to read out to the jury the entirety of the petition of complaint. It was a procedure which should never have been allowed.

Per Rankin C. J. : (*Subramanyam and Mukerji JJ. concurring*). That the introduction of the notice of the jury at the beginning of the case of all these highly prejudicial matters was unnecessary and unfair to the accused and was highly calculated to complicate the issues. The course adopted by the counsel for the prosecution threw upon the Judge, at the very commencement of the case, the necessity of coming to a decision immediately and in advance of the evidence.

Per Jack J. : As the Magistrate endorsed on the complaint produced at the trial that R stated its contents on oath, under section 80 of the Evidence Act, the Court should presume it to be genuine and under section 4 of that Act, the Court should presume it to be proved unless and until it was disproved. It was admitted under section 9 of the Evidence Act to show that there was such a case under section 372 Indian Penal Code. The allegations in the complaint, bad as they were, did not add, in reality, very greatly to the charge that he had sold her, a girl under 18, for purposes of prostitution—a charge which necessarily had to go to the jury being the charge at the trial of which forged certificate was used.

A criminal case had been started in Benares against Ram and others for having kidnapped R in August, 1936. In that case, the grandmother of R named S, gave evidence and acted as an interpreter in that case. It was alleged that S in her deposition in that case had stated that R was 15 or 16 years of age. Prosecution counsel recalled and asked R about the said statement for the purpose of proving that the statement was made and P knew of it :

Held, per Rankin, C. J. (*Subramanyam and Mukerji JJ. concurring*), that S's evidence in the Benares case was not admissible in evidence in this trial and was not legally admitted.

Per C. C. Ghose, J. : Having regard to section 80 of the Evidence Act, the document which purported to be a record or memorandum of the evidence of S in the Benares case, was admissible in evidence without formal proof, if the identity of the deponent S was established on the evidence of R.

That the effect of the evidence of S against the petitioner was so slight that the jury ought to have been properly cautioned.

Per Jack J. : S's statement being that of a witness in a judicial proceeding purporting to be signed by the Magistrate and produced before the Court, should be taken to be proved under section 80 of the Evidence Act. R's evidence as to the

- statements of S was only necessary to show that it was this particular occasion to which R was referring and her evidence was not admissible to prove what statements were made.

The learned Judge referred in the course of his charge to the jury to the evidence of S in the following words :—"Some evidence has been adduced to show that P knew perfectly well that the girl was under 18. That is not very material ; but if he knew that she was under 18 that would be an additional reason for supposing that he knew the document to be forged. The evidence of S, who gave evidence in Benares that the girl was at that time 15 has been put in, and some other statements of R about her age, one of which deals with a statement she made in a petition, not on oath, in which she said she was 14. We are not concerned as to whether R stated her age correctly or what her age was. If, on that evidence you are of opinion that P must have known that she was under 18, that would be a reason for concluding, that he knew the document was forged":

Held, per Rankin C. J. (Sukrawardy and Mukerji J.J. concurring), that this charge amounted to a misdirection.

Per C. C. Ghose, J.: That the learned Judge should have told the jury that the petition of complaint had not been admitted as evidence in the case, that the contents thereof, which were objected to, were irrelevant to the matter in issue at the trial before the jury and that the jury were not to pay any attention whatsoever to the contents of that petition. This was non-direction and it was non-direction of such a character as to amount to misdirection.

Per Rankin C. J. (Sukrawardy and Mukerji J. concurring), that, although the jury had before them the fact that the Magistrate had acquitted P, unless, however, some caution was given to the jury, this circumstance by itself would not necessarily efface from their minds the impression created by the accusations which they had heard.

The sole purpose of the forgery was to defeat the charge under section 372 I. P. C. and the jury had to consider whether in all the circumstances of the case, it was safe and reasonable inference to hold that the document had not been forged in the interests of P without P being well aware of what was being done in his interest.

That the question was entirely for the jury who had to make up their mind whether it was proved that P when he used the document was aware that it had been altered.

Per C. C. Ghose, J.: The question arising on the evidence of S, whether P knew that R was under 18, should not have been left to the jury in the words which the learned Judge seem fit to use and it would have been advisable if the jury had been told that it was a matter for them to find out on the entire evidence on record whether there was any justification for the theory that P knew that R was under 18, seeing that the prosecution did not adduce any substantive evidence on the point.

It was not open to the jury to conclude that P knew that R was under 18 years of age.

Although the charge was to be taken as a whole, there was no neutralising expression in the charge.

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Per Jack J: As regards the omission in the charge of a caution to the jurors not to allow their minds to be influenced by the allegations in the petition against P's character, no great weight could be attached to this omission, as at the time the petition was admitted, it was expressly stated by the learned Judge and by the advocate for the Crown that the petition was put in merely to prove that there was a complaint under section 372 I. P. C. by R, and the jury were told not to allow themselves to be prejudiced by the allegations against the accused contained therein, as also the counsel for defence warned the jury not to let their minds be influenced by these allegations. The counsel for the prisoner should have directed the attention of the Judge to the omission.

The fact that P had reason to know the girl to be below 18 was relevant under section 11 of the Evidence Act.

The passage in the charge referred to when taken with the remainder of the charge, was not a misdirection.

The admission of S's statement in evidence could in no way have affected the decision of the case.

Application for Review under clause 26 of the Letters Patent.

The accused was convicted by Mr. Justice Jack, and a common jury on charges laid down under sections 193 and 471 Indian Penal Code, of abetment of the offence of fabricating false evidence and on the substantive charge of dishonestly using as genuine a forged document knowing the same to be forged. The accused then applied under clause 26 of the Letters Patent to the Advocate-General for his fiat, which was given on the 8th April 1929 as follows :

" Certificate of the Advocate-General of Bengal under clause 26 of the Letters Patent of 1865.

"1. Whereas the accused Padam Prosad was tried on the 8th and 9th days of January 1929 at the Criminal Sessions holden in this Honourable Court, in its Original Criminal Jurisdiction before the Hon'ble Mr. Jack and a Common Jury on indictments, particulars whereof will appear from annexure hereto marked with the letter A, being case for fiat under clause 26 of the Letters Patent submitted to me on the 28th March 1929.

" 2. Whereas the facts set out in the annexure, are certified by Mr. B. C. Chatterji Advocate for accused Padam Prosad and

" 3. Whereas Mr. A. K. Basu on behalf of the Crown stated that the facts as set out in the said annexure are correct, and

" 4. Whereas both the said Advocates made their representations to me in connection with the said case ;

" Now I Nripendra Nath Sircar, Advocate-General of Bengal,

- do under and by virtue of the powers entrusted to me by the Letters Patent for the High Court of Judicature at Fort William in Bengal bearing date the 28th day of December 1865, certify that in my judgment whether the direction to the Jury given by the learned Judge, was right in law, and whether there were misdirections as contended in Paragraph 22 of the said annexure A being sub-paragraphs (II), (III), (V), (IX), (XI), (XII), (XIV), (XX), (XXI), should be further considered by the said High Court,

Sd. N. N. Sircar."

Messrs. B. C. Chatterjee and N. N. Basu for the Petitioner.

Messrs. A. K. Basu and A. C. Mukherjee for the Crown.

C. A. V.

The following judgments were delivered :

Rankin, C. J.—In this case Padam Prosad was tried at the High Court Sessions by my learned brother, Mr. Justice Jack, and a common Jury on charges laid under sections 193 and 471 of the Indian Penal Code together with Sujauddin Ahmed and Kanhya Lal. He was convicted on the unanimous verdict of the jury of abetment of the offence of fabricating false evidence and also on the substantive charge of dishonestly using as genuine a forged document knowing the same to be forged. Kanhya Lal was acquitted of both charges and Sujauddin Ahmad was convicted of abetment of the offence of fabricating false evidence and also of abetment of the offence of dishonestly using as genuine a forged document knowing the same to be forged.

On the 19th March 1927 a Nepali girl called Rajkumari presented a petition of complaint to the Additional Chief Presidency Magistrate charging Padam Prosad with diverse offences and in particular with the offence of having sold her to one Hirall Agarwala for immoral purposes. She alleged that she was of the age of about 14 years and asked that process issue against the accused under section 372 of the Indian Penal Code, that is for the offence of selling a minor girl for immoral purposes. The Magistrate commenced the trial of the accused on the 14th of April 1927. On the 17th May 1927 he framed charges against the accused including a charge under section 372. On the 6th of August 1927 he gave judgment acquitting the accused.

The case for the prosecution at the High Court Sessions was that Padam Prosad in the course of the trial before the Magistrate had filed and made use of a document purporting to be a certified copy of an extract from the daily register of births of the year

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1908 kept in thana Dasaswamedh, Benares, with a view to show that the girl Rajkumari was over the age of 18 years at the time at which it was alleged that she had been sold; and that at the time when the document was filed and used as aforesaid it had been altered in four places—in two places 1909 had been altered to 1908 and in two places the name "Baber" had been inserted in front of the name "Jung Bahadur", the effect of the forgery being that whereas the genuine entry recorded the birth as on the 19th June 1909 and the father as being Jung Bahadur, the document as forged showed the date of birth as the 19th June 1908 and the father as Baber Jung Bahadur. It was proved at the trial that application had been made for the certificate on the 26th of April 1927 by Sujauddin who was acting as Padam Prasad's *tadbirkar* in the case before the magistrate. The certificate is in Urdu script and the alterations made in it have been made so as not to be noticeable though a careful examination discloses that the document has been tampered with. It is proved, however, that Padam Prasad does not know Urdu script. Upon the evidence, there can be no doubt that Sujauddin obtained the certificate in order that it might be altered and used as part of the defence of Padam Prasad. The sole question, so far as Padam Prasad is concerned, was the question whether or not Padam Prasad had been proved to have known that the document had been altered at the time when he used it for the purpose of his defence before the Magistrate. Upon that question the evidence before the jury was almost entirely circumstantial. The sole purpose of the forgery was to defeat the charge under section 372 and the jury had to consider whether in all the circumstances of the case, it was a safe and reasonable inference to hold that the document had not been forged in the interests of Padam Prasad without Padam Prasad being well aware of what was being done in his interest. The prosecution was able to reinforce this consideration by the evidence of Mr. Pashupati Bhattacharjee, the advocate who had conducted his defence before the Magistrate. Mr. Bhattacharjee's evidence makes it clear that Padam Prasad was well aware of the importance to him of showing, if he could, that the girl was above 18 years of age at the time of the offence charged; that Padam Prasad came from Benares and attended the conferences held on behalf of the defence; that Sujauddin also attended at these conferences when the question of the proof of the girl's age was discussed; that Sujauddin was the person who read the Urdu documents and that the certificate afterwards filed before the

Magistrate was produced at these conferences and was discussed. The defence on the other hand contended that there was no direct evidence to show that Padam Prosad knew what Sujauddin had been doing on his behalf, that he was wholly unable to read a word of the document in question, that he was relying upon Sujauddin for the preparation of the defence and for obtaining all documents which might assist the defence. They relied upon a statement of Mr. Bhattacharjee that Padam Prosad's instructions to him were that he was quite ready to cite witnesses from Benares Collectorate to prove the certificate which they were putting in. They relied also on the fact at the close of the trial in the Magistrate's Court no attempt had been made by Padam Prosad to get the document back though it would have been quite easy to do this before any question of forgery had been raised by Rajkumari. They relied further upon a statement made by Padam Prosad on the 24th September 1927 when the investigating officer first questioned him about this document—the statement being that Sujauddin had told him that Rajkumari's birth certificate would be available at Benares Collectorate and that he had asked Sujauddin to take a copy of the extract and to make it over to Mr. Bhattacharjee.

Broadly speaking these were the considerations upon either side. It seems clear to me that the question was entirely for the jury who had to make up their minds whether it was proved that Padam Prosad when he used the document was aware that it had been altered. There was evidence upon which the jury were entitled to find him guilty but it cannot be said in this case that a verdict of acquittal would be unreasonable. The accused had a serious case to meet but he had at the worst a good fighting chance.

It may here be emphasized that at no time did the prosecution as part of their case allege or undertake to prove what the age of the girl was. No evidence was called upon that point. Rajkumari herself could not very well prove the date of her birth, but in any case no question was asked of her in examination-in-chief bearing upon the question of her age. Some questions were asked of her in cross-examination for the purpose of showing that she had given different dates at different times. It is true that each of these different statements, if true, made her out to be a minor at the material time.

In the fiat of the Advocate-General, which has led to these proceedings under clause 26 of the Letters Patent, a number of matters are referred to as grounds of objection taken by Padam Prosad to the learned Judge's conduct of the trial and to his

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charge to the jury. Excepting upon two points it is reasonably clear to me that these objections have no substance. The charge of the learned Judge was fair, lucid and accurate, well calculated to apprise the jury of the real questions in the case and the state of the evidence upon the points in controversy. Two objections, however, require careful consideration.

The learned counsel who opened the case for the prosecution insisted upon reading to the jury in his opening the whole of Rajkumari's petition of complaint against Padam Prosad in the section 372 case. That petition alleged against Padam Prosad various highly prejudicial matters—that he was a man of loose morals, that he was notorious for seducing Nepalese girls, that he used to keep such girls as concubines, that he had assaulted and raped the complainant on diverse occasions. It was clearly necessary that the jury should know that the proceedings before the Magistrate were proceedings upon the charge of selling a minor girl for immoral purposes but these other allegations had, *prima facie*, no bearing upon the question whether the certificate of birth was forged or not and if so whether this was known to Padam Prosad. The reading of this petition was objected to by counsel for the accused and in the circumstances I confess to being somewhat astonished that the Crown Counsel did not at once appreciate that the introduction of the notice of the jury at the beginning of the case of all these highly prejudicial matters was unnecessary and unfair to the accused—a thing which could do no good whatever and was highly calculated to complicate the issues. The course adopted by counsel for the Crown threw upon the Judge, at the very commencement of the case, the necessity of coming to a decision immediately and in advance of the evidence. So far as criminal cases are concerned, the opening for the prosecution ought always to be confined to matters which are necessary to enable the jury to follow the evidence when it is brought before them. This is not the stage of a case at which doubtful questions of admissibility should be either raised or decided. Whether a document is admissible or inadmissible is a matter which should always be ruled upon at the time the document is being proved or put in or the question asked of the witness. In many cases a thing may be good evidence at one stage of the case and inadmissible at another. It is frequently necessary to give evidence to lay the foundation which justifies a question or the putting in of a document. The opening speech of the counsel for the prosecution does not afford a proper occasion for the determining of such questions.

It appears to me that the petition of complaint of Rajkumari was a document which the prosecution were entitled to put in. Even if it had been put in, there was no reason, however, why the whole of it should be read to the jury as its only relevance was that it showed that Padam Prosad was being prosecuted on a charge which involved that the girl was a minor girl. The unfortunate consequence in this case of the learned counsel insisting upon reading this document to the jury in his opening was, first, that when the time came to prove the document the learned counsel apparently forgot to prove it. The record shows that when Mr. Bhattacharjee was giving evidence the document was marked for identification. A second consequence was that at the end of the trial the matter was overlooked. The learned Judge did not have it in mind to caution the jury that they must not allow these unproved accusations against Padam Prosad to affect their judgment. The result is that the defence is in a position to complain before us that prejudicial matter was read to the jury and was not properly proved thereafter; also that no warning was given to the jury. Now it is quite true that the jury had before them the fact that the Magistrate had acquitted Padam Prosad. Unless, however, some caution was given to the jury this circumstance by itself would not necessarily efface from their minds the impression created by the accusations which they had heard. They may have thought that Padam Prosad had been acquitted merely because the girl was not shown to be a minor, that his acquittal may have been due in part or in whole to the forged certificate of birth which had been produced in his defence. The Judge's charge contains no discussion which would clarify the minds of the jury upon any such point though it is quite true that an intelligent jurymen listening to the charge of the learned Judge and appreciating it properly would see that the learned Judge proceeded in no way upon these accusations and invited them to deal with the case on the footing that the jury were not concerned as to the age of the girl and were not concerned whether Padam Prosad was acquitted or not or on what grounds he was acquitted. This the learned Judge in one passage stated to the jury expressly; but it is not equivalent to a caution to the effect that highly prejudicial matter had been brought before them and that it was their duty to see that their verdict was in no way affected by it.

The second complaint which requires examination is this: The prosecution, as I have said, at no time undertook to prove

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that the girl was in fact a minor. They were not therefore in a position to ask the jury to hold that because the girl was a minor, because Padam Prosad was related to the girl or had other means of knowing the truth, he must have known that she was a minor. Rajkumari however was recalled at the instance of the prosecution to give evidence that in August 1926 Padam Prosad was acting as interpreter in a Court at Benares which was investigating a charge against certain persons of having kidnapped Rajkumari; and that in the course of that case Rajkumari's grand-mother, Setharani, gave evidence and stated that Rajkumari's age was 15 or 16. This evidence was objected to by the defence but was allowed by the Judge and it appears from the shorthand notes that counsel for the prosecution stated that he did not want the statement of Setharani to go in for the purpose of proving the truth of that statement of fact, but only for the purpose of proving that such a statement was made and Padam Prosad knew of it. The recorded deposition of Setharani was produced and accepted as evidence. Whether or not this deposition was properly proved and accepted under section 80 of the Evidence Act is a matter about which a question has been raised. I am not myself satisfied that there is under section 80 of the Evidence Act any objection to this document on the mere question of sufficiency of proof, but it is unnecessary in my opinion to discuss that matter. The learned Judge in his charge dealt with this portion of the evidence in the following manner:

"Some evidence has been adduced to show that Padam Prosad knew perfectly well that the girl was under 18. That is not very material; but if he knew that she was under 18 that would be an additional reason for supposing that he knew the document to be forged. The evidence of Setharani, who gave evidence in Benares that the girl was at that time 15, has been put in, and some other statements of Rajkumari about her age, one which deals with a statement she made in a petition, not on oath, in which she said she was 14. We are not concerned as to whether Rajkumari stated her age correctly or what her age really was. If on the evidence you are of opinion that Padam Prosad must have known that she was under 18, that would be a reason for concluding that he knew the document was forged".

In my opinion this passage in the charge of the learned Judge amounted to a misdirection. It was not open to the jury to find that the girl was in fact under 18 and it was not open to them to conclude that Padam Prosad knew that the girl was

• under 18. If on some occasion he had heard the girl's grandmother make a statement about her age—a statement which might be true or false—which he might believe or disbelieve, it in no way follows that when a certificate purporting to be a certificate of her birth was produced he would know that the certificate was forged. In this case the prosecution had to rely entirely upon circumstantial evidence arising out of the fact that the document had been forged for the benefit of Padam Prosad and that Padam Prosad had been shown to be taking a close interest in the preparation of his own defence. Padam Prosad knew at least from March 1927 that he was being prosecuted on the footing that the girl was under age. This was being solemnly alleged against him as a thing which the prosecution would attempt to prove in a Court of law. It added nothing whatever to the prosecution case to offer proof that he had heard the girl's grand-mother say that she was 15 or 16 unless that statement was to be taken as a true statement and unless the jury were to be invited to hold first that the girl was in fact a minor and secondly that Padam Prosad in the circumstances knew of this fact. In my opinion it was not open to the jury to conclude that Padam Prosad knew the certificate to be forged because he knew that she was under 18. If such a statement as Setharani's was admissible in evidence at all it was very unnecessary that the jury should be cautioned that they must not take that statement as in any way tending to prove the age of the girl. No such warning was given to them on the contrary they were told "If on that evidence you are of opinion that Padam Prosad must have known that she was under 18, that would be a reason for concluding that he knew the document was forged". As the case was conducted at the trial, the prosecution, while not professing to prove the girl's age, in the end were given the benefit of Setharani's evidence in another case upon that very point,

In my opinion it is not possible to suggest that the verdict of the jury may not very well have been affected by the direction given to them upon this matter. I have a sufficiently high opinion of common juries in Calcutta to induce me to doubt whether the absence of a caution with reference to the prejudicial matter in Rajkumari's petition of complaint would by itself have made it necessary to interfere with the verdict. But on the point as to Padam Prosad's knowledge of her age I think the case is very different. The verdict of the jury cannot be

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allowed to stand unless we are of opinion that the same verdict would have been arrived at had they been correctly and sufficiently directed (*R. v. Panchu Das*) (1). It is not open to us to direct a retrial and I am not prepared to hold that the jury, assuming it to be a reasonable jury, would have convicted the accused if the direction complained of had not been given. In my opinion the verdict and sentence must be set aside and Padam Prosad must be acquitted and discharged.

It was contended before us that Article 162 of the First Schedule to the Limitation Act, 1908, applied to proceedings under clause 26 of the Letters Patent. This contention was overruled at the hearing. The phrase "to review the case" as used in clause 26 applies as much where a point of law is reserved by the trial Judge as where the Advocate-General has given a certificate. I am far from saying that inordinate delay may not be a matter for consideration by the Advocate-General at the time when he is called upon to consider whether a certificate should be granted. But we are not now dealing with an "application for review of judgment" within the meaning of Article 162.

C. C. Ghose, J:—This is an application for review of a criminal case on the certificate of the Advocate-General of Bengal under clause 26 of the Letters Patent of 1865. The petitioner, Padam Prosad Upadhyaya, was tried on the 8th and 9th January last at the Criminal Sessions of this Court by Mr. Justice Jack and a common jury on charges under sections 193 and 199 read with 193 and 471 and 199 read with 471 of the Indian Penal Code. The accused pleaded not guilty to the said charges. There were two other persons named Sujauddin and Kanhya Lal who were tried along with the accused. The jury brought in an unanimous verdict of guilty against the present petitioner and Sujauddin and of not guilty in favour of Kanhya Lal. The present petitioner was sentenced by the learned Judge to undergo rigorous imprisonment for a period of three years.

It appeared at the trial that one Rajkumari had filed a petition of complaint against the petitioner in March, 1927, in the Court of Mr. A. Z. Khan, Additional Chief Presidency Magistrate, Calcutta, charging him with having committed an offence punishable under section 372 Indian Penal Code. The petitioner was tried by the said Mr. Khan, the trial having lasted from the 14th April, 1927, to the 6th August, 1927; but ultimately the petitioner was acquitted. An application to the High Court

(1) (1920) I. L. R. 47 Calc. 671; 31 C. L. J. 402.

for leave to appeal against the said order of acquittal was rejected. It was alleged that during the trial of the above mentioned case before the said Magistrate, the present petitioner had fabricated false evidence for the purpose of being used in judicial proceedings by inserting a word, namely, "Babar" and by altering a certain date in two places in a document purporting to be a certified copy of an entry in a Register of Births kept in Benares relating to the birth of Rajkumari and with having used as genuine the said document knowing or having reason to believe the same to be forged. An application was subsequently made on behalf of the said Rajkumari to the said Magistrate in order that a complaint against the petitioner might be made under section 476 Criminal Procedure Code, but the Magistrate rejected the same on the 31st October, 1927. There was an application to this Court in its Revisional Jurisdiction. This Court directed the prosecution of the present petitioner on the 23rd May, 1928. The learned Chief Presidency Magistrate took cognizance of the case and ultimately committed the petitioner to stand his trial at the Criminal Sessions of this Court. At the trial before Mr. Justice Jack, the entirety of the petition of complaint of Rajkumari dated the 19th March, 1927, was read out to the jury. This was objected to on behalf of the petitioner but the objection was overruled by the learned Judge.

The petition of complainant of Rajkumari which initiated the proceedings against the present petitioner in 1927 contained, among other things, the following allegations:—"That your petitioner knew the accused to be a man of loose morals, notorious for seducing Nepalese girls from Nepal, some of whom he used to keep as concubines and some of whom he used to sell to others and as such your petitioner did not like to go to the house of the accused and accordingly with the help of one Gobind Kishori's wife she removed to the house of Govinda Kishori with a view to avoid being forced to go over to the house of the accused. That thereafter the accused had your petitioner forcibly removed to his own house at Benares where she was intimidated, assaulted and raped by the accused on diverse occasions and your petitioner was kept in a state of complete confinement for about two months and your petitioner found herself absolutely without any help to protest against the ill-treatment meted out to her. That in the month of September, 1926, your petitioner was brought down to Calcutta by the accused along with six or seven other young girls and stopped with Hiralal and after some

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time the accused left Calcutta along with the other girls after selling your petitioner to the said Hiralal Agwarwalla for Rs. 1300 for immoral purposes."

There was another incident at the said trial before Mr. Justice Jack to which attention has been called. It appeared that a criminal case had been started in Benares against one Ram Prosad and others for having kidnapped Rajkumari. This was in August 1926, just before Rajkumari came to Calcutta. In that case the grandmother of Rajkumari named Sethirani, gave evidence and the present petitioner acted as an interpreter in that case. It was alleged that Sethirani in her deposition in that case had stated that Rajkumari was 15 or 16 years of age. Learned Counsel for the Crown wanted to recall Rajkumari and to ask her about the said statement of Sethirani for the purpose of showing that the petitioner knew that such a statement had been made. In this connection the following discussion took place before the learned Judge :

"Mr. A. K. Basu:—I want to recall Rajkumari and put one or two questions about the Benares case. Padam Prosad was the interpreter in that case and as such was aware that Sethirani, the grandmother of Rajkumari, said in her deposition that Rajkumari was 15 or 16 years of age."

"Mr. Chatterjee:—I object to any statement of Sethirani supposed to have been made by her in the Benares Court being proved here by Rajkumari. Such a thing cannot be legally done in view of the fact that Sethirani is living, and further that any statement by her cannot in any way be relevant to any issue in this case between the Crown and the accused."

"Mr. Basu:—I do not want the statement of Sethirani to go in for the purpose of proving the truth of that statement of fact, but only for the purpose of proving that such a statement was made and Padam Prosad knew of it."

"Court:—I allow that."

The learned Judge allowed the evidence of Sethirani in the Benares case to be put in evidence and it was marked as Exhibit 13. Apparently it was sought to be argued on behalf of the prosecution that it had been proved through Rajkumari that the petitioner had heard Sethirani say in the Benares Court that in August 1926 she (Rajkumari) was 15 or 16 years of age and that that fact went to show that although the petitioner knew Rajkumari to be below 18 at the time of her sale for immoral purposes, he was trying to rely on a document which purported to

• prove that she was above 18 at the time and that in the circumstances it could be inferred that the petitioner must have known that the said copy of the Birth certificate was a fabricated or false document. The learned Judge referred in the course of his charge to the Jury to the evidence of Sethirani in the following words:—
 "Some evidence has been adduced to show that Padam Prosad knew perfectly well that the girl was under 18. That is not very material; but if he knew that she was under 18 that would be an additional reason for supposing that he knew the document to be forged. The evidence of Sethirani, who gave evidence in Benares that the girl was at that time 15 has been put in, and some other statements of Rajkumari about her age, one of which deals with a statement she made in a petition, not on oath, in which she said she was 14. We are not concerned as to whether Rajkumari stated her age correctly or what her age really was. If, on that evidence you are of opinion that Padam Prosad must have known that she was under 18, that would be a reason for concluding, that he knew the document was forged".

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At the hearing of the present application for review under clause 26 of the Letters Patent, it was strenuously argued by Mr. Chatterjee on behalf of the petitioner (1) that under no circumstances could counsel for the prosecution have been allowed to read to the jury the entirety of Rajkumari's petition of complaint dated March 1927 and that the procedure adopted by the prosecution was wholly wrong and unjustifiable inasmuch as the petition of complaint was not tendered in evidence and consequently the petitioner was deprived of the opportunity of cross-examining Rajkumari on the statement made by her in the said petition of complaint and of removing from the minds of the jury the unfavourable impression that must have been created by the reading of the petition of complaint. Mr. Chatterjee further argued (2) that Sethirani's evidence in the Benares case was not admissible in evidence in this trial and had not been legally admitted and (3) that the portion of the learned Judge's charge to the jury set out above was calculated to materially prejudice the jury against the petitioner.

Before I proceed to consider the three objections summarised above, I desire to make a passing reference to the scope of clause 26 of the Letters Patent. I do not desire to go through the numerous cases on this point and it is sufficient for me to observe that the available authorities are collected in the cases

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Emperor v. Fateh Chand (1); *Emperor v. Panchn Das* (2) and *Emperor v. Barendra* (3). The trial Judge may reserve a point of law or points of law for the opinion of the High Court or the Advocate-General may certify that in his judgment there is an error in the decision of a point or points of law decided by the trial Judge or that a point or points of law which has or have been decided by the trial Judge should be further considered. The Court then reviews the entire case or such part of it as may be necessary and finally determines such point or points of law reserved or certified as the case may be and "thereupon" may alter the sentence passed by the trial Court and pass such judgment and sentence as shall seem right to the Court. The word "thereupon" has been construed to mean that the determination of the point or points of law reserved or certified must be in favour of the prisoner before the Court can interfere with the conviction and sentence. It has been definitely held that if it be found that the opinion of the trial Judge on the point or points reserved or certified cannot be supported, it is not open to this Court to direct a re-trial. No doubt, the Court has power under clause 26 to examine the evidence and determine for itself whether, after the exclusion of the evidence or matter which may be considered inadmissible, the residue on the record is sufficient to justify the conviction. But there is a large mass of authority in support of the view that the Court will not substitute its own finding for the verdict of the jury and that it must consider whether the evidence or matter improperly admitted was of such a nature that it possibly may have considerably influenced the minds of the jury and whether it was reasonably certain that the jury *would*, not *might*, have acted on the unobjectionable evidence if the wrongly admitted evidence or matter had not also been presented to them. Further, it has been held that Section 537 of the Code of Criminal Procedure has no application to a case under clause 26 of the Letters Patent [per Mookerjee, J in *Emperor v. Fateh Chand* (4)] although I am not unmindful of the fact that a contrary view has been taken by Mr. Justice Rankin, as he then was, in the case *Emperor v. Colin Mackenzie Mackay* (5).

(1) (1916) I. L. R. 44 Calc. 477; 24 C. L. J. 400.

(2) (1920) I. L. R. 47 Calc. 671; 31 C. L. J. 402.

(3) (1923) 28 C. W. N. 170; 38 C. L. J. 411.

(4) (1916) I. L. R. 44 Calc. 477 (503); 24 C. L. J. 400 (423).

(5) (1926) 30 C. W. N. 276 (285) (F. B.); 43 C. L. J. 311 (319) (F. B.)

These being the guiding considerations for determination of an application under clause 26 of the Letters Patent, I now proceed to consider the objections taken on behalf of the petitioner *seriatim*. It is a rule of universal application that in a criminal trial Counsel for the prosecution, in opening the case to the jury, can only state *all* that it is proposed or intended to prove in the case, so that the jury may see if there is any discrepancy between the opening statements of Counsel and the evidence afterwards adduced in support of them and that it is wholly improper for Counsel for the prosecution to open any matter to the jury in respect whereof no evidence is intended to be or can be adduced at the trial. In this case, learned counsel for the prosecution has explained before us that his only object in placing the petition of complaint of Rajkumari before the jury was to draw attention to the fact that she had stated therein that she was 14 years of age. If that was the sole object, it was a grave error, in my opinion, on the part of learned Counsel for the prosecution to read out to the jury the entirety of the petition of complaint by Rajkumari containing as it did the statement set out above and it was a procedure which was rightly objected to by Mr. Chatterjee on behalf of the petitioner. It was a procedure which should never have been allowed. It is elementary that very great care must be taken by Counsel for the prosecution in the observations he makes to the jury (*R. v. Rudland*), (1) and that topics of prejudice connected with the character of the prisoner should be carefully excluded [*R. v. Bloom*, (2)]. The fiction of law, in criminal cases, is, that the judge is Counsel for the prisoner. It may not be inappropriate in this connection to recall the famous words of Kenyon, C. J. in *R. v. Wakefield*, (3) where he observed: "I have been reminded that I sit here as Counsel for defendant. I certainly do so, so far as to interpose between him and counsel for the prosecution and to see that no improper use of the law is made against him and that no improper evidence is given to the jury." These words have been quoted with approval in *R. v. O'Connell* (4). It is also beyond the region of doubt that counsel for the prosecution ought not to struggle to obtain a conviction, but should regard themselves rather as ministers of justice, assisting him in its administration than as Advocates [*R. v. Banks* (5)]. In my opinion, there can be no doubt that the

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(1) (1865) 4 F & F. 495. (2) (1910) 74 J. P. 183; 4 Cr. App. Rep. 30.

(3) (1799) 27 St. Tr. 679.

(4) (1843-4) 5 St. Tr. N. S. 12 (702).

(5) (1916) 2 K. B. 621.

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allegations in the petition of Rajkumari were such as must have and could not but have influenced the Jury against the petitioner at the very *beginning* of the trial. The jury, in the circumstances, could not possibly get out of their minds the fact that the petitioner was a depraved person. This was specially unfortunate because of the fact that the learned Judge in the course of his charge to the Jury did not tell the Jury, as he should have done, that the petition of complaint had not been admitted as evidence in the case, that the contents thereof, which were objected to, were irrelevant to the matter in issue at the trial before the Jury, and that the jury were not to pay any attention whatsoever to the contents of that petition. This was non-direction and it was non-direction of such a character as to amount to misdirection. It was stated before us that counsel for the prosecution had warned the Jury that they were not to act on the allegations in the petition of complaint. This in my opinion was not enough. The learned Judge, in the events which had happened, should have himself warned the jury and taken steps to repair the mischief that had been done. It was further stated before us that learned counsel for the petitioner did not ask the learned Judge to caution the Jury in the matter of the contents of the petition of complaint of Rajkumari. I do not agree that after what had happened when the petition was read out to the Jury, it was not possible or practicable for learned Counsel for the petitioner to submit anything further to the learned Judge. In my opinion it was open to the learned counsel for the petitioner to draw the attention of the learned Judge to the matter at the time when he charged the jury. But the fact that learned counsel did not do so is, in the circumstances, really immaterial. A grave omission to direct the Jury on a vital point cannot be made good merely by counsel's calling attention to it at the termination of the summing up (*R. v. Willet*, (1): It is not really necessary for me to pursue the question raised by learned counsel for the petitioner as to whether or not, in the circumstances, he should have been given an opportunity of cross-examining Rajkumari for the purpose of showing that the allegations in her petition were not founded on fact. In my opinion, as indicated above, the allegations in that petition, to which objection had been taken, were clearly irrelevant; it would have been sufficient if learned counsel for the prosecution had briefly opened the matter to the jury by saying that a case under section 372 Indian Penal Code had been started against the petitioner on

- the complaint of Rajkumari and that he had been acquitted of that charge. It is not necessary to elaborate the matter further but it is impossible to resist the conclusion that an atmosphere of prejudice had been allowed to be created by reason of what has been referred to above and that there are grave reasons for concluding that the chances of the petitioner in obtaining a fair trial at the hands of the jury were seriously jeopardised.

As regards Exhibit 13, being the evidence of Sethirani I am not prepared to say, having regard to the provisions of section 80 of the Indian Evidence Act, that the document, which purported to be a record or memorandum of the evidence of Sethirani in the Benares case, could not be admitted in evidence without formal proof. Section 80 of the Evidence Act does not deal with the question of admissibility of the documents referred to therein, but simply dispenses with the necessity of their formal proof by raising the presumption that everything in connection with them had been legally and correctly done i. e. (i) that the documents purporting to be record of evidences or statements or confessions are genuine (ii) that the statements as to the circumstances under which they were taken, made by the officer who affixed his signature are true and (iii) that the evidence, statement or confession was duly taken. Assuming that the identity of the deponent Sethirani was established on the evidence of Rajkumari the evidence was admissible. In the circumstances of the present case, however, the effect of the evidence of Sethirani against the petitioner was so slight that the Jury ought to have been properly cautioned. Padam Prosad was not a party to the Benares case; he acted merely as an interpreter and he might or might not have remembered when the copy of the Birth Certificate was produced in the Magistrate's Court what Sethirani had stated about Rajkumari's age. The learned Judge however used words, in the extract from his charge to the Jury set out above wherein there was an undercurrent of suggestion that the petitioner knew or had the means of knowing that Rajkumari was under 18 and that itself was a reason for concluding that he knew the document referred to at the trial, namely, the copy of the Birth Certificate, was forged. on the record as it stood, it was not in my opinion open to the Jury to conclude that Padam Prosad knew that she was under eighteen years of age. Further the learned Judge made a reference to Rajkumari's petition, which had not been admitted in evidence, although marked for identification. I am not unmindful that the charge has to be taken as

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a whole but I do not find in the charge any neutralising expressions. These circumstances, along with what has been stated, are, in my opinion, sufficient for coming to the conclusion that the present case has been brought within the rule laid down in *Emperor v. Panchu Das* (1) and that this Court will hesitate to substitute its own finding on the residue on the record for the verdict of the jury. In my opinion, the question arising on the evidence of Sethirani, whether Padam Prosad knew that Rajkumari was under 18, should not have been left to the jury in the words which the learned Judge saw fit to use and that it would have been advisable if the jury had been told that it was a matter for them to find out on the entire evidence on record whether there was any justification for the theory that Padam Prosad knew that Rajkumari was under 18, seeing that the prosecution did not adduce any substantive evidence on the point.

In conclusion it is impossible for me to say that the jury were not very considerably influenced against the accused on the matters referred to above and, that being so, I would therefore set aside the conviction and sentence and direct that the prisoner be acquitted and discharged.

Suhrawardy, J :—I agree in the order which the learned Chief Justice has passed.

Mukerji, J :—I concur in the judgment delivered by my Lord the Chief Justice.

Jack, J :—Padam Prosad was tried under section 372 Indian Penal Code on the charge of having sold Rajkumari a girl under 18 years of age for purposes of prostitution. He was acquitted. He was subsequently charged at the High Court Sessions with having dishonestly used at that trial (and abetted the fabrication of) a forged birth certificate which purported to show that Rajkumari was over 18 years of age. His defence and that of his co-accused Sujauddin (his *tadbirkar* in the case under section 372) was that they were unaware that the birth certificate was forged. They were both convicted. (Padam Prosad of the principal offence under section 471 and Sujauddin of abetment, and both of abetment of fabrication of the birth certificate.)

In the present application under section 26 of the Letters Patent the principal ground urged for review of Padam Prosad's conviction is that the trial was vitiated by the admission in evidence of Rajkumari's complaint in the case under section 372

(1) (1920) I. L. R. 47 Calo. 671 ; 31 C. L. J. 402.

- Indian Penal Code and by the omission to warn the jury not to be influenced by the allegations therein against the accused.

The original record of that complaint produced at the trial bears the Magistrate's endorsement to the effect that Rajkumari stated its contents on oath. Under section 80 of the Evidence Act therefore the Court shall presume it to be genuine and under section 4 of the Evidence Act the Court shall presume it to be proved unless and until it is disproved. It was admitted in evidence in that it was read over to jury in opening the case by the Counsel for the Crown. It was admitted under section 9 of the Evidence Act to show that there was such a case under section 372 Indian Penal Code. It is suggested that inasmuch as there are allegations in the complaint which might prejudice the jury against the accused the complaint should not have been admitted. These allegations are that the accused was notorious for seducing Nepalese girls and that Rajkumari was intimidated, assaulted and raped by him while in his custody previous to being sold for purposes of prostitution. These allegations, bad as they are, did not add, in reality, very greatly to the charge that he had sold her, a girl under 18, for purposes of prostitution—a charge which necessarily had to go to the jury being the charge at the trial of which the forged certificate was used. The trial cannot therefore be said to have been materially affected by the reading over of the complaint in its entirety.

As regards the omission in the charge of a caution to the jurors not to allow their minds to be influenced by the allegations in this petition against Padam Prosad's character, no great weight can be attached to this omission when it is borne in mind that, at the time the petition was admitted, it was expressly stated by the Court and by the Advocate for the Crown that the petition was put in merely to prove that there was a complaint under section 372 Indian Penal Code by Rajkumari, and the jury were told not to allow themselves to be prejudiced by the allegations against the accused contained therein. Further the learned Counsel for the defence who addressed the jury (as stated in the charge) at considerable length, warned them (as he has told us) not to let their minds be influenced by these allegations. The jurors must have realised that the Judge approved of this part of his address which was unchallenged and that the learned Advocate was entitled to warn them to totally disregard these allegations. Finally the jury were informed that the accused Padam

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Prosad was acquitted in that case and no attempt was made to lead the jury to believe that he was acquitted merely because it was found that the girl was above 18 years of age. Had this omission to warn the jury finally been felt to be of any importance at the time, I have no doubt the learned and experienced advocate for the defence would have directed the attention of the Court to the omission. I do not think it at all probable that the jurors were influenced by these allegations which were merely included in the original petition of Rajkumari read out to them at the opening of the trial and not specifically alluded to thereafter. Nor do I think the unanimous verdict of the jurors should be set aside on the mere speculation that these allegations might have influenced them to some extent when it is clear that the verdict was entirely justified by the evidence.

The only other ground for review which has been seriously pressed is that Sethirani's evidence in that case (including a statement that Rajkumari's age was fifteen or sixteen) was not proved, and was not admissible in evidence in that case nor was Rajkumari's evidence about it admissible.

Sethirani's statement was that of a witness in a judicial proceeding purporting to be signed by a Magistrate and produced before the Court. It must therefore be taken to be proved under section 80 of the Evidence Act read with section 4.

The fact that Padam Prosad had reason to believe the girl to be below 18 was relevant under section 11 of the Evidence Act since it might make it highly probable that he knew that the birth certificate which showed her to be above 18 was forged. The fact therefore that Padam Prosad heard the girl's grandmother state on oath before a Magistrate that her age was 15 or 16 was relevant and admissible in evidence. Rajkumari's statement in this connection was necessary and admissible to show that it was this Padam Prosad who was present in the Court interpreting Sethirani's evidence on that occasion and that the Sethirani who deposed was her grandmother and was referring to herself. Rajkumari's evidence as to the statements of Sethirani was only necessary to show that it was this particular occasion to which Rajkumari was referring and her evidence was of course not admissible to prove what statements were made.

It was however urged that the jury were misdirected regarding the application of this evidence in the following passage in the charge: "Some evidence has been adduced to show that Padam Prosad knew perfectly well that the girl was under 18. That is

not very material. But if he knew that she was under 18 that would be an additional reason for supposing that he knew the document to be forged. The evidence of Sethirani, who gave evidence in the Benares Court that the girl was at that time, 15, has been put in with some statements of Rajkumari about her age, one of which deals with a statement she made in a petition, not on oath, in which she said she was fourteen. We are not concerned as to whether Rajkumari stated her age correctly *or what her age really was*. If, on that evidence, you are of opinion that Padam Prosad must have known that she was under 18, that would be a reason for concluding that he knew the document was forged".

It must be borne in mind that the jury could have been under no misapprehension as to the purpose for which Sethirani's evidence was admitted inasmuch as this was discussed in their presence when its admission was objected to by the defence, and they were told that it was not admissible in proof of the age of Rajkumari but merely to prove that Padam Prosad heard her grandmother make this statement. This appears from the statement of the learned Crown Counsel which the learned defence advocate has admitted to be correct. Now in this passage in the charge to which objection has been made the jury are directed that if they think that Padam Prosad, (having heard her grandmother Sethirani make this statement about the girl's age or on account of statements made by the girl herself) must have considered the girl to be under 18 that would go to show that he knew the birth certificate was forged. This is what that passage in the charge was obviously intended to convey to the jury and what I believe it did convey to them when taken with the remainder of the charge. It is, I think, in no sense a misdirection.

The jury were told that this evidence was not very material, nor was it; for it was not really necessary to support the charge in this case that Padam Prosad should have any opinion as to the age of the girl, and, in any case since Padam Prosad was Rajkumari's uncle by marriage and used frequently to visit Sethirani his mother-in-law while Rajkumari was living with her at Benares, it was clear that he had every opportunity of knowing the girl's age. In these circumstances the admission of Sethirani's statement in evidence can, I think, in no way have affected the decision of the case, for the jury would, most probably, have judged Padam Prosad's belief as to the age of the girl, if they thought it of any consequence at all, by their own opinion of her age on seeing her in the witness

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box. It was probably her appearance which led to the Court to use in the charge the words "must have known" instead of "must have thought" in reference to Padam Prosad's opinion. Even if it is held that the jurors were wrongly led to conclude that Padam Prosad believed the girl to be under 18. by the direction in the charge regarding the application of Sethirani's evidence, the fact of such belief on his part would only be a very minor point to be considered in deciding whether he knew the certificate to be forged. The jury were, I think, bound to base their finding as to his guilty knowledge almost entirely on the manner in which the certificate was obtained and used by him and, as reasonable men with some experience of human affairs, they would most certainly, I think, on that evidence alone conclude that he must have known that the birth certificate was forged.

Under section 167 of the Evidence Act the improper admission or rejection of evidence shall not of itself be a ground for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that if the rejected evidence had been received, it ought not to have varied the decision.

The section is imperative and applies to any decision in any case and therefore necessarily to the decision of the High Court when exercising its powers under clause 26 of the Letters Patent. It seems to me that the circumstances in which the forged birth certificate was obtained and used in the case make it practically certain that Padam Prosad as well as Sujaudhin must have known it to be forged. "*Agents et consentientes pariposnaplectentur.*" Reference has been made to the fact that the accused had offered to bring evidence to prove the birth certificate. This was I think merely bluff. Padam Prosad was throughout in close consultation with the pleaders conducting the case, and, if he thought the certificate genuine, why did he not put it in evidence to rebut the elaborate expert evidence of the two I. M. S. doctors who said she was under 18. If genuine this piece of evidence would have made his acquittal certain: in fact the prosecution case must have been withdrawn immediately. Again great virtue has been attached to the omission of the accused to withdraw the forged birth certificate immediately, but, in fact, its withdrawal after the case would by no means have prevented his successful prosecution for filing it, for the fact that it had been filed was on record, and the evidence of forgery was independent of the appearance of the document. On

the one hand to leave the certificate on the record would disarm suspicion, on the other hand an application for its return would have reminded the authorities of its existence and of the allegation that it was forged. The defence, in the absence of Sujauddin, have now skilfully thrown the blame on him, and would have the Court believe that Padam Prosad was carefully kept in the dark as to the immense risk his agent Sujauddin was running on his behalf in obtaining and using a forged birth certificate. The jurors did not take this view. On the other hand they naturally concluded that in the circumstances Padam Prosad must have known of the forgery, and their opinion could not, I think, have been influenced by want of detail in the charges. The charge was intentionally abbreviated, as stated in the opening, in view of the exhaustive manner in which the defence case had been presented to the jury by the learned advocate for the defence. The powers of the High Court under clause 26 of the Letters Patent are perfectly clear. The Court is to review the entire case or such part of it as may be necessary, and finally determine the point or points of law reserved or certified and thereupon may alter the sentence passed by the trial Court and pass such judgment and sentence as shall seem right to the Court. A statute must be taken to mean what it says, and it must be remembered that, if the words of a statute be plain and clear, it is not for the Court to raise any doubt as to what they mean. I have discussed the case with reference to the probable verdict of a jury had there been no defect or omission in the charge, in defence to the views of the learned Judges who hold that this should be the criterion, but, with very great respect to these views, it must always be remembered that it is open to the Court, in the words of the statute, to pass such judgment and sentence as shall seem right to the Court. It would therefore be superfluous to cite decisions such as *Queen Empress v. O'Hara* (1), and others showing that the Court can, on review, examine the evidence for itself and determine without reference to the probable verdict of a jury, whether, excluding the inadmissible evidence, the residue is sufficient to justify the conviction. As pointed out by Sir Asutosh Mookerjee J in *Emperor v. Pancku and another* (2) "The Judicial Committee did not by their decision in *Subramaniya v. King-Emperor* (3) overrule by implication the series of cases in Calcutta and Bombay where the High Court had in cases reserved or certi-

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(1) (1890) L. L. R. 17 Calc. 642.

(2) (1920) 24 C. W. N. 501; L. L. R. 47 Calc. 671; 31 C. L. J. 402.

(3) (1902) L. L. R. 25 Mad. 61.

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fied reviewed the evidence and determined the guilt of the accused."

In the same case Walmsley J. being satisfied on the merits that the accused were guilty, said "I do not think it necessary to ask what view a jury would take of the evidence except in so far as the opinion of a hypothetical jury affords a standard of reasonableness." There might be some excuse for hesitating to deprive the accused of the benefit of a jury trial where the demeanour of the witnesses was of any importance, but in a case like the present one in which the evidence is entirely circumstantial, no importance is to be attached to the demeanour of the witnesses, and we are in as good a position as the jurors to decide on the evidence as to the guilt of the accused. On the one hand the prosecution has been deprived of the right to retrial which would certainly have been ordered had the case been tried in an ordinary Sessions Court, and, on the other hand, it is insisted that the case should be determined by the probable verdict of a hypothetical jury. The fact that a retrial cannot be ordered ought to make the Court in the interests of justice careful to avoid setting aside a conviction on grounds which, however plausible they have been made to appear, have no solid foundation in fact. Therefore it was, I think, that by making the terms of the statute so wide the Legislature intentionally provided that the Court should be unhampered by technicalities, and any attempt to introduce restrictions on the powers of the Court where there are none in the statute is I think, to be deprecated. Great respect is due to the views expressed by Sir Barnes Peacock, Chief Justice in the case of *Elakes Buxsh* (1) and quoted with approval by Sir Francis Maclean, C. J. in the case of *Emperor v. Charn Chunder Mukherjee* (2). "Although I am of opinion that the Legislature intended that the Sudder Court should have the power of setting aside a verdict of guilty pronounced by a jury upon an erroneous or defective summing up of the evidence by the presiding Judge, yet I think it was not their intention that a verdict of guilty should be set aside in every case in which there is a defective or erroneous summing up. It was their intention to provide protection for the innocent but not chances of escape for the guilty if every convict against whom a verdict of guilty is pronounced by a jury has a right to have that verdict set aside upon appeal, and to obtain his discharge whenever it can be shown that the presiding Judge has not properly directed the jury as to the degree of weight which

(1) (1866) 5 W. R. Cr. 80; B. L. R. Sup. 459.

(2) (1904) 38 C. L. J. 309 (F. B.).

ought to be given to particular evidence, a wide door would be thrown open for the escape of guilty men, and the due administration of the criminal law of this country should be placed in the greatest jeopardy" *Elakee Buxh* (1). This was the interpretation put upon the statute in 1866 and it is well recognised that a contemporaneous interpretation is the best and strongest in law.

From this point of view if the Court is convinced on the evidence that the accused is guilty he should not be acquitted merely on account of a defective charge.

I think therefore, with great respect to the views of my learned colleagues to whom I have submitted this judgment in advance, that this application for review, ought to be refused.

The following order was then made :

The order of the Court is that Padam Prosad be acquitted and discharged and that his bail bond stands cancelled.

S. C. Bose : Attorney for the Petitioner.

B. C. Sen : Attorney for the Crown.

A. T. M.

Accused acquitted.

(1) (1866) 3 W. R. Cr. 80; B. L. R. Sup. 459.

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PRIVY COUNCIL

PRESENT : Lord Carson, Sir Lancelot Sanderson and Sir
Binod Mitter.

RADHÖBA BALOBA VAGH AND OTHERS

v.

ABURAO BHAGWANTRAO SHIROLE AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Limitation—Indian Limitation Act, (IX of 1908), Sec. 1, Art. 127—Exclusion from joint family property—Intention to exclude—Plaintiff ceasing to reside in family house and not receiving maintenance, etc from the other members—Onus probandi on defendants—Rectals in deed, as corroborative evidence.

The question whether the plaintiff has been excluded from joint family property within the meaning and for the purpose of Article 127 of the Indian Limitation Act, 1908, must depend upon the facts of each particular case. An intention to exclude is an essential element of the definition of the word

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"exclusion" in the Limitation Act, and it is, therefore, necessary for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude the plaintiff from his share of the joint family property when he should choose to assert his rights.

The circumstance that the plaintiff voluntarily ceased to reside in the family dwelling-house; that the members of the joint family (in control and possession of the joint property) did not subscribe towards his maintenance, education or marriage expenses, and that for many years the plaintiff did not exercise his right to partition, while material for consideration, is not decisive on the question of his exclusion from the joint family property.

In a suit by a member of a joint Hindu family for his share in the family property, where the defence is that the suit is barred by limitation, the *onus probandi* is on the defendant to establish that the plaintiff was excluded from the joint family property to his knowledge for more than 12 years before the date of the suit.

Held, on the evidence, (reversing the judgment of the High Court), that the defendant had failed to discharge the *onus* of proving the exclusion on which they relied.

Recitals in a deed are admissible in evidence as corroboration of the testimony given by the party thereto and his witnesses upon material matters recited in the deed.*

Appeal No. 98 of 1927 by the Plaintiffs from a judgment and decree of the High Court, Bombay, (*MacLeod C. J.* and *Coyajee J.*) dated the 17th February, 1925, reversing a judgment and decree, dated the 22nd January, 1923 of the Court of the first Class Subordinate Judge of Poona, and dismissing a suit which he had decreed.

The appellants brought that suit on the 21st July, 1920, against the respondents for a ninth share of property which was in their possession as joint family property.

The appellants claimed part of that share through the 3rd appellant Nana: the respondents denied that Nana was a member of their family, but they withdrew this denial at the hearing of the appeal in the High Court and confined their defence to a contention not specifically raised in the issues, i. e., that they had excluded Nana from the joint family property, and his exclusion had been known to him for more than 12 years before suit. The Subordinate Judge decided against, and the High Court in favour of, this contention.

*[See (1916) L. L. R. 44 Calc. 286, P. C. and (1914) L. L. R. 36 All. 187; 19 C. L. J. 469—K. J. R.]

Dunn K. C. and *Raihs* for the Appellants.

De Gruyter K. C. and *Parikh* for the Respondents.

The following authorities were cited at the Bar during the course of the argument :—*Hari v. Maruti* (1) ; *Ramchandra v. Narayan* (2) ; *Krishnabai v. Khargwada* (3) ; *Jivankhat v. Anikhat* (4) ; *Jaganatha v. Ramabhadra* (5) ; *Mutthakke v. Timmappa* (6) ; *Sellam v. Chinammal* (7) ; *Ram Lakhi v. Durga Charan Sen* (8) and *Raghunath Bai v. Maharaj Bai* (9).

Their Lordships' judgment was delivered by

Sir Lancelot Sanderson : This is an appeal by the plaintiffs against a decree of the High Court of Judicature of Bombay, dated the 17th of February, 1925, which reversed a decree of the Subordinate Judge of Poona, dated the 22nd of January, 1923.

The plaintiffs brought the suit for a declaration that the immovable and movable properties mentioned in the plaint were the ancestral properties of the joint family of the third plaintiff, Nana Ramras, and the defendants, and that the plaintiff Nana had a one-ninth share in the said properties, for partition and other consequential reliefs.

It appears that by a deed, dated the 6th of June, 1910, Nana sold his one-ninth share in certain of the properties mentioned in the plaint for Rs. 1,500 to the father of the first and second plaintiffs.

The father of these plaintiffs died, and it was alleged that after his death, namely, on or about the 13th of August, 1919, Nana obtained a further sum of Rs. 500 from the first and second plaintiffs, that the first and second plaintiffs had thus become the owners of Nana's one-ninth share of the property described in Schedule B of the plaint.

Consequently the first and second plaintiffs were joined with Nana as parties in the suit for partition.

(1) (1882) I. L. R. 6 Bom. 741.

(2) (1836) I. L. R. 11 Bom. 216.

(3) (1893) I. L. R. 18 Bom. 197 (202).

(4) (1896) I. L. R. 22 Bom. 259.

(5) (1838) I. L. R. 11 Mad. 380 (392).

(6) (1891) I. L. R. 15 Mad. 186 (192).

(7) (1901) I. L. R. 24 Mad. 441.

(8) (1885) I. L. R. 11 Calc. 680 (682).

(9) (1885) I. L. R. 11 Calc. 777 I. L. R. 12 I. A. 118.

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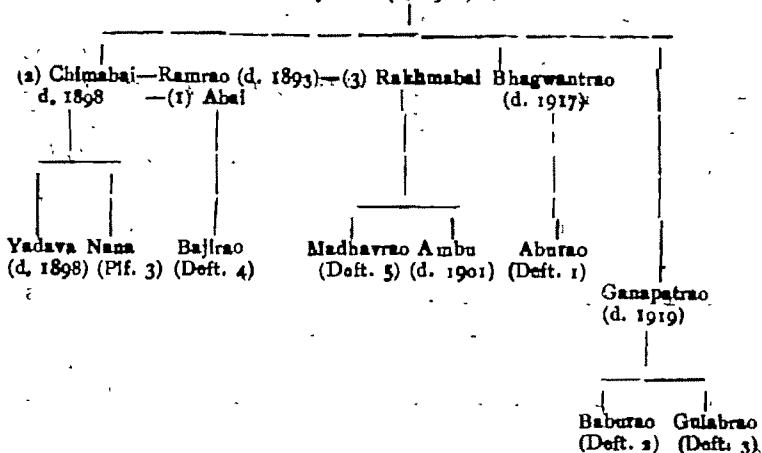
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The pedigree relied upon by the plaintiffs was as follows :—
RAJARAM (d. 1900).



The defence of the first five defendants was twofold : they alleged—(1) that Nana was not the son of Ramrao, that Chimabai, the mother of Nana, was of a wicked nature and was driven out of the house by Ramrao ; that Nana was never joint with the defendants, and that he was not a member of the joint family. (2) That the suit was barred by the law of limitation.

It was alleged that, after attaining majority, Nana made an attempt to get a share in the property, that he was told in clear terms that he had no interest therein, and that his right was denied by the defendants, by his deceased paternal uncles, and others.

No date for the alleged attempt by the plaintiff and the alleged denial of his interest was specified in the written statement of the first five defendants, but in the course of the evidence given on behalf of these defendants it was alleged that the date was 1905-1906 or 1906-1907.

The suit was instituted on the 24th of July 1920, and these defendants, relying upon Article 127 of Schedule I of the Indian Limitation Act IX of 1908, alleged that the suit was barred by limitation.

The defendants 6, 7 and 8 were added as parties to the suit by reason of their having an interest in some of the property, but they did not dispute the plaintiff's case.

The learned Subordinate Judge held that Nana was the son of Ramrao by his wife Chimabai and that there was no exclusion made to the knowledge of Nana. Consequently he made a preliminary decree in favour of the plaintiffs to the effect that

the plaintiff Nana had a one-ninth share in the immovable and movable property therein mentioned, and he directed that the lands should be partitioned by the Collector. The learned Judge, after dealing with certain incidental matters, directed that the defendants Nos. 1 to 5 should pay the plaintiffs' costs as well as those of the other defendants.

The first and fifth defendants, viz. Aburao Bhagwantrao Shirole and Madhavrao Ramrao Shirole, appealed to the High Court against the decree of the learned Subordinate Judge, making the other parties to the suit respondents.

On the hearing of the appeal the finding of the learned Subordinate Judge as to the legitimacy of Nana was not disputed, and the only question argued before the High Court was whether Nana, the third plaintiff, had been excluded from the joint family property to his knowledge for more than twelve years before the date of the suit, viz., the 21st of July 1920.

The learned Judges of the High Court allowed the appeal and dismissed the suit, but directed that there should be no order as to costs throughout. The ground of their decision was that the whole series of facts, beginning with 1898, when his mother died, showed that Nana's connection with the family had been severed and that he acquiesced in that severance.

Their conclusion was that Nana was excluded from the joint family property from 1898, and that he must be taken to have been perfectly well aware of the fact in 1904, when he came of age.

From the judgment and decree of the High Court the plaintiffs have appealed.

The material facts of the case are as follows: After the death of his first wife Abai, Ramrao married Chimabai, who became the mother of two sons, Yadava and Nana.

Within a year of this second marriage and while Chimabai was living in the family dwelling-house, Ramrao married a third time, Rakhmabai being the third wife.

It was found by the learned Subordinate Judge that Ramrao had a second son by Chimabai, namely, Nana, the third plaintiff, who was born in June, 1886. As already stated, this finding is not now disputed; but it is not immaterial to note that the case of the first five defendants was that Chimabai's second son was named Keshav, who was alleged to be dead.

The learned Subordinate Judge held that Keshav was "a fabulous person."

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The family dwelling-house of Ramrao and his joint family was at Bhamburda, and there is no doubt that up to 1886 Chimabai was living with her husband in the aforesaid family house.

Apparently there was much friction in Ramrao's family, due, it is alleged, to the presence of Rakhmabai, and in the year 1886, soon after the birth of Nana, Chimabai and her two children were taken by her maternal uncle, Appa, with the consent of her husband Ramrao, to live with him at a place called Patas.

Chimabai and her two sons lived with her maternal uncle until 1888.

On the 8th September, 1888, Chimabai sent what was called a "notice" in writing to her husband Ramrao, demanding maintenance for herself and her two children. The "notice" was as follows :

"The date the 8th of September 1888 A. D.

"NOTICE.

"To

"Ramrao Bin Rajaram Shirole residing at Bhamburde, Taluka Haveli, District Poona.

"Notice is given by the undersigned as follows :

"You are my husband and you married a second wife afterwards, and consequently you could not make proper arrangement for my living (with you), and you were always troubling and beating me. Thereafter during the period of my delivery no proper arrangements were made, and consequently I became very ill. At that time my maternal uncle had come to Poona, to whom you told that he should take me with him, as I was very ill. Therefore my maternal uncle took me to his place, i.e., at Patas. Even though $2\frac{1}{4}$ years have elapsed since then, you have never again inquired of me. Besides, I have two small children. You have not even cared for them, nor are you taking us to your place. You should, therefore, make arrangements for the maintenance of myself and my children from this day. This is in order. If you fail to do so, I shall take legal steps against you. You should send a reply to this Notice within fifteen days from to-day."

The result of the "notice" was that Chimabai and her two children were brought back by Ramrao, or by one of his brothers acting on his behalf, to the family dwelling of Ramrao at Bhamburda, and Chimabai and her two sons lived there until Ramrao's death in 1893,

Chimabai and her two sons after 1893 continued to live in

the family dwelling-house until 1898, when Chimabai and her elder son died of the plague.

Chimabai died on the 23rd February, 1898, and Yadava, the elder son, died on the following day.

Nana's maternal uncle, Appa, went to Bhamburda for Chimabai's obsequies, and, and with the consent of Bhagwantrao, the paternal uncle of Nana, he took Nana to his own home in the village of Sonavadi.

At that time Nana was twelve years old.

It is material to note that this is the date at which, according to the judgment of the High Court, Nana's connection with the family was severed, and his exclusion from the joint family property began.

Nana lived with and was maintained by his maternal uncle, Appa, at Sonavadi, and assisted his uncle in his agriculture.

Nana was illiterate. This is one of the facts relied upon by the first five defendants as showing that he was excluded from the joint family and the joint family property. It was, however, pointed out by the learned Subordinate Judge that when Nana's father died he was about seven years old and had not attained the school-going age.

After his father's death, as the learned Subordinate Judge held, Rakhmabai ruled the family, and it was not the fault of Nana that he was not put to school.

In 1898 Nana was removed to the house of his maternal uncle at Sonavadi, where there was no vernacular school, although there appeared to have been a school at Dhond, to which Sonavadi boys used to go.

It was alleged by the first five defendants, as already stated, that in 1905 or 1906 Nana went to Bhamburda and demanded a share of the family property, and that he then received a definite refusal from some of the members of the joint family. These defendants relied on this alleged incident as evidence of an exclusion from the joint family property at that time.

The learned Subordinate Judge said that he did not believe the witnesses called to prove the above-mentioned alleged demand and refusal in 1905 or 1906, and he held that Nana's demand for a share was not made until 1909, when it was refused, and that, consequently, the suit was in time.

The learned Judges of the High Court came to no definite decision as to the alleged incident of 1905—1906, but based their decision upon the general evidence in the case.

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Their Lordships' attention was drawn to the evidence, upon which the first five defendants relied, to support the allegation that it was in 1905 or 1906 that Nana demanded a share of the joint family property and was refused. They are clearly of opinion that the learned Subordinate Judge's decision in this respect was right, and that there was no satisfactory evidence upon which it could be held that in 1905 or 1906 Nana made a demand for a share of the property and was refused by the members of the joint family.

Nana was married in or about 1908. His marriage took place at Sonavadi at the same time as the marriage of Appa's brother, and Appa's evidence was that Nana's marriage caused no additional cost.

It is clear that no application was made by or on behalf of Nana to the members of his joint family for any assistance towards his marriage expenses.

About two years after his marriage Nana began to live separately, and he then got some land, which he rented from the Government, at Sonavadi.

The plaintiffs' case was that in 1909 Nana went to Bhamburda and saw Bhagwantrao, who was the eldest surviving brother of Ramrao, and presumably at that time the *harta* of the family, as Ramrao died in 1893 and Rajaram died in 1900.

Nana's evidence was to the effect that at this interview Bhagwantrao advised him to continue joint and not to demand a separate share; but that he, Nana, insisted on a partition.

Then, it was alleged, Bhagwantrao promised to arrange an advance of money for Nana, and that he took Nana to Baloba Narayan Vagh, the father of the first two plaintiffs, and that he obtained the sum of Rs. 1,500 from Baloba Narayan Vagh.

Nana alleged that Bhagwantrao, although still persisting in his refusal to partition the property, did not deny Nana's share in it.

There is no doubt that Nana did obtain Rs. 1,500 from Baloba Narayan Vagh, the father of the first two plaintiffs, though, according to the deed of sale, to which reference has already been made, the said sum was not obtained until June, 1910.

On the 6th June, 1910, Nana executed the deed of sale in favour of Baloba Narayan Vagh, the father of the first two plaintiffs. It was recited therein that the properties included in the deed were ancestral and belonged to the joint family of Nana's

father and uncles, that Nana had a one-ninth share therein, and the amount of the consideration was Rs. 1,500.

The deed contained the following recital :—

"I was six or seven years old when my father died. After my father's death my mother Chimabai and I used to live with my uncle for some days. But owing to step-motherly relations there were quarrels and disputes between my mother and other members of the family. Thereafter my mother died. Therefore I used to live with my maternal uncle. Appa Bahirji Patil Pawar, who resides at Sonavdi, Taluka Bhimthadi. About a year ago I came to Poona and asked my uncles and my stepbrothers to effect a partition and to allot to me my one-ninth share of our ancestral property. But they refused to give (my) share. I am not a permanent resident in Poona, and as I follow the occupation of a cartman at Mouje Sonavdi Peta Dhond, I cannot live at Poona and I cannot afford to fight a suit (in a court of law). Therefore I have received from you Rs. 1,500—in words, rupees fifteen hundred—as price of my one-ninth share of the aforesaid property and have sold to you my right of ownership, title and interest with respect to the one-ninth share of the said property."

It was argued on behalf of the defendant-respondents that the recitals in the above-mentioned deed were not admissible as evidence against them on the issue whether Nana demanded a share of the property in 1909.

It was submitted that it did not come within section 157 of the Indian Evidence Act, Act I of 1872, upon which the learned Counsel for the plaintiffs relied.

It was urged that the statement therein contained as to the fact of his having gone to Poona and having asked his uncles and stepbrothers to effect a partition about a year before the deed was executed could not be said to be a former statement made by Nana at or about the time when the fact took place, inasmuch as the statement in the deed was made a year after the fact was alleged to have happened.

It may be that this particular statement does not come within section 157 on the ground that it was not made at or about the time of Nana's alleged interview with Bhagwantrao in 1909, but, in their Lordships' opinion, the deed is admissible in evidence as corroboration of the evidence given by Nana and his witnesses upon material matters; as, for instance, the statement by Nana that Bhagwantrao said he had no money, but that he would "find a creditor" for Nana, and that Bhagwantrao did take him to Baloba Narayan

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Vagh. In other words, the deed is some evidence of the act alleged to have been done in pursuance of Nana's interview with Bhagwantrao, and it is material on the question whether the evidence of Nana and his witnesses on this part of the case can be relied upon.

While dealing with this part of the case, their Lordships observe that it is difficult to understand how Nana would have been able to negotiate the arrangement culminating in the deed of the 6th June, 1910, without assistance from someone.

He was illiterate, he had been living away from Bhamburda since he was a boy, he would not have sufficient knowledge of his own to enable him to describe the parcels of immovable property which are so fully set out in the deed, and it is extremely unlikely that a man in Nana's position would be able to negotiate with Baloba Narayan Vagh on his own account and without being introduced and assisted by some responsible person.

Baloba Narayan Vagh, according to the evidence of one of his sons, was on friendly terms with Bhagwantrao and lived on Bhagwantrao's land. This is the person to whom Nana said in his evidence Bhagwantrao took him.

Apart from the particular recital in the deed as to the interview with Nana's uncles about a year ago, the deed itself is material corroboration of the plaintiffs' case and was admissible in evidence.

It appears that in 1912 Nana instituted a suit against Baloba Narayan Vagh and Bhagwantrao, treating the above-mentioned sale deed as a mortgage, and alleging undue influence on the part of Bhagwantrao. He prayed for a declaration that the deed was a mortgage and that joint possession of the property should be granted. In his written statement delivered in October, 1912, Bhagwantrao denied that Nana was entitled to any share in the joint family property. This is the first occasion, of which there is any reliable evidence, when Bhagwantrao denied that Nana was entitled to a share in the family property.

There was no allegation at that time that Nana had been excluded from the joint family property in 1905 or 1906. That suit was withdrawn for a reason which it is not material to consider.

In 1914 another suit was filed by Nana against Baloba Narayan and Bhagwantrao, and again in his written statement Bhagwantrao denied that Nana was the son of Ramrao.

On the 13th of August, 1919, Nana executed a further sale deed

- of his share in the property in favour of the first two plaintiffs. His claim that the previous sale deed was merely a mortgage was given up and he received a further sum of Rs. 500, which, taken with the previous Rs. 1,500 and the interest thereon, was calculated to make up a total of Rs. 3,500.

The present suit was brought on the 21st of July, 1920.

The issue in this appeal is whether the suit was barred by reason of Article 127 of the First Schedule of the Indian Limitation Act IX of 1908.

The article is as follows :—

<i>Description of Suit.</i>	<i>Period of limitation.</i>	<i>Time from which period begins to run.</i>
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- | | | |
|---|---------------|--|
| 127. By a person excluded from joint family property to enforce a right to share therein. | Twelve years. | When the exclusion becomes known to the plaintiff. |
|---|---------------|--|

The questions arising upon the above-mentioned article are :

- (1) whether Nana was excluded from the joint family property ;
- (2) if he was so excluded when did such exclusion take place ;
- (3) when did the exclusion, if any, become known to Nana.

As regards the first and second questions, it was argued on behalf of the contesting defendants that it should be held that Nana was excluded from the joint family property from the year 1898, when he went to live with his maternal uncle after his mother's death, and reliance was particularly placed upon the facts that after that date Nana never resided in the family dwelling-house, he received no maintenance or education from the members of the joint family, who did not provide anything towards the expenses of his marriage, and that for many years he did not exercise his right to partition.

The above-mentioned facts are certainly material for consideration, but in their Lordships' opinion they are not conclusive on the question of exclusion of Nana from the joint family property.

There is no definition of the word "exclusion" in the Limitation Act, and it is obvious that the question whether a person has been excluded from joint family property, must depend upon the facts of the particular case which is under consideration. It was admitted in argument by the learned Counsel for the defendants that an intention to exclude in an essential element. Their Lordships are of opinion that the above-mentioned admis-

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sion is correct, and that it is necessary for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude Nana.

Their Lordships are of opinion that there was no evidence which would justify them in holding that Nana was excluded from the joint family property in 1898.

The evidence goes to show that the departure of Nana from the family dwelling-house in 1898 with his maternal uncle was voluntary. He was in no sense turned out. He went with the consent of Bhagwantrao. The reason for his departure is obvious: his father and mother were dead, he was only twelve years old, and, as the learned Subordinate Judge pointed out, Rakhmabai ruled that branch of the family, and having regard to the state of affairs under that rule and to what had previously occurred, it may well have been thought better for Nana that he should go with his maternal uncle rather than remain in the same house with Rakhmabai.

It remains to be seen whether there is evidence of his exclusion from the joint family property after that date.

As he grew up he helped his maternal uncle in his agriculture and then was able to get some land for himself from the Government. It is true that he was living in a humble way, and was not educated in the same way as the other members of the joint family who were living at Bhamburda, but there is nothing to show that he was dissatisfied with the conditions under which he was living. One reason given for his not visiting Bhamburda was that he did not go on account of the quarrelsome nature of his stepmother Rakhmabai.

His marriage expenses were practically nil, as his marriage took place at the same time as that of his maternal uncle's brother.

The mere fact that during the time that Nana was living with his maternal uncle the members of the joint family did not subscribe towards his maintenance, education or marriage expenses does not, in their Lordships' opinion, having regard to the facts of this case, prove that those in control and possession of the joint family property intended to exclude him from his share of the joint family property. It is consistent with the evidence that the members of the joint family, who were in control and possession of the joint property, though willing to allow Nana to be maintained at the expense of his maternal uncle, never did anything

- to indicate to Nana or anyone else that they intended to exclude him from his share in the joint family property.

It is not necessary to refer in detail again to the facts of the case: it is sufficient for their Lordships to say that up to the time when Nana attained his majority in 1904 they are consistent with there having been no intent to exclude Nana from the joint family property and no exclusion in fact.

In 1904 Nana attained his majority. Their Lordships cannot find any reliable evidence that there was any change in the position until 1905.

The defendants' attempt to prove a demand by Nana in 1905 or 1906 and a refusal by his paternal uncles entirely failed. It is material to notice that Abba, the maternal uncle of Nana, was not asked in cross-examination if he had told Nana that he was entitled to a share in the joint family property, or had drawn his attention to the advisability of claiming his share: a question which their Lordships would have expected might usefully have been put to Abba.

In short, with the exception of the alleged demand in 1905 or 1906 (the proof of which failed), their Lordships' attention was not drawn to any act or acts during the period from 1904 to 1909 which would indicate an exclusion of Nana from his right to share in the joint family property.

Their Lordships have no doubt that in or about 1909 Nana did go to Bhamburda and did assert his right to a share in the joint family property.

It was argued on behalf of the defendant-respondents that the recital in the deed of the 6th of June, 1910, viz., "that they refused to give (my) share," was inconsistent with Nana's evidence.

Their Lordships do not take that view, and are of opinion that the said recital, when read with the other terms of the deed, in which it was alleged that Nana had asked his uncles and his stepbrothers to effect a partition and to allot to him a one-ninth share, so far from being inconsistent with Nana's evidence, may be said to be corroborative thereof.

If Nana's evidence is accepted *in toto*, there was not, even in 1909, any denial by Bhagwantrao of Nana's right to a share, but merely a refusal to partition the property at that time, and their Lordships are of opinion that the sale deed of 1910 does provide material corroboration of Nana's evidence that up to that time there was no exclusion of Nana from the joint family property.

Even if it be taken that the refusal on the part of Bhagwant-

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rao in 1909 or 1910 to agree to a partition was based on an allegation that Nana was not entitled to share in the joint family property, and that it did amount to an exclusion of Nana from such property, the suit was brought within twelve years and was in time.

The conclusion of their Lordships on this part of the case is that the evidence is consistent with there having been no exclusion of Nana from the joint family property before 1912, and that being so, that defendants have not discharged the onus of proving the exclusion on which they relied.

In view of this opinion, it is not necessary to consider the third question above mentioned. Their Lordships, however, desire to observe that, with regard to the third question, even assuming that the facts relied upon by the defendants could be said to amount to exclusion, the defendants have failed to prove that Nana was aware more than twelve years before the institution of the suit of any intention on the part of the members of the joint family to exclude him from the joint family property when he should choose to assert his rights.

In considering the whole case, it is not immaterial to remember that the main defence of the contesting defendants was that Nana was not a member of their joint family, that the further case made was that he was definitely refused a share in 1905 or 1906, and that both these allegations have been held to be unfounded.

For these reasons their Lordships are of opinion that this appeal should be allowed, that the decree of the High Court should be set aside, and the decree of the Subordinate Judge should be restored.

The respondents 1 to 5 should pay the costs of the plaintiffs of this appeal and of the appeal to the High Court, and their Lordships will humbly advise His Majesty accordingly.

S. L. Polak : Solicitors for the Appellants.

T. L. Wilson & Co : Solicitors for the Respondents.

K. J. R.

Appeal allowed.

• PRESENT: *Lord Shaw, Lord Carson, and Sir Lancelot Sanderson.*

BHUBAN MOHAN BASAK

v.

THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS
OF THE DACCA MUNICIPALITY AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.]

*Tax—Bengal Municipal Act (III B. C. of 1884), Sec. 102—Bye law (Rule 16)—
Putting two resolutions together—Commissioners sanctioning a budget on
the basis of old valuation—Re-valuation list subsequently signed and notice
published.*

At a meeting of the Commissioners two resolutions were moved and seconded. The first was "That the question of a general revision of assessment be postponed for a year in view of the economic distress prevailing in the country, and that all new and improved buildings which had escaped notice be assessed first, and the Vice-Chairman be requested to undertake the work." The second was "That the general revision of assessment of holdings be undertaken without delay, as it was overdue." The appellant urged that under the bye-laws of the Municipality (Rule 16) the Chairman was bound to put the two resolutions separately and not alternatively :

Held, that as such objection was not urged in the High Court, the proceedings objected to were not enquired into and the objection was held to be without any real substance.

It was also contended that the rate was invalid because the Commissioners, before the result of the re-valuation had been ascertained, and became known to them, sanctioned a budget framed on the basis of the old valuation and of the percentage of which rates had been for some years levied on that valuation i. e. 10 per cent being the highest percentage which the Municipal Act allowed. It was in evidence that the revaluation list was subsequently signed by the Chairman and deposited in the office and notice was published on the same date :

Held, that under section 102 of the Municipal Act, there was no illegality.

Appeal No. 123 of 1927 by the Plaintiff, from a judgment dated the 14th December, 1925, of the High Court, Calcutta, which affirmed a judgment and decree, dated the 24th November, 1924, of the District Judge of Dacca, who had affirmed a judgment and decree, dated the 26th May, 1924, of the Munsiff of Dacca.

The appeal to the Privy Council raised questions under the Bengal Municipal Act, 1884.

The case in the High Court is reported in I. L. R. 53 Calc. 453 ; 44 C. L. J. 275

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Raihes for Appellant.*Dunne K. C.* and *Dube* for Respondents.

Their Lordships' judgment was delivered by

Lord Carson :—This action was brought to challenge the validity of a tax or rate which the first defendant was seeking to enforce on the ratepayers of Dacca. On the 28th June, 1922, the Municipal Commissioners of the Dacca Municipality passed a resolution as follows : " That the general revision of assessment of holdings be undertaken without a delay, as it was overdue." This resolution was passed in pursuance of Section 96 of the Municipal Act. In accordance with the terms of the resolution, the valuation duly took place and the assessment list was published on the 28th March 1923, for the year 1923-24. The action of the plaintiff has already been heard before three different courts, each of which decided against the plaintiff and in favour of the validity of the rate, and as their Lordships are in agreement with the decree appealed from it will be only necessary to state the facts very briefly.

In the first place, the plaintiff contended that the rate was based on a new valuation and assessment which the Municipal Commissioners had not authorized, founding his objection to the manner in which the said resolution had been passed. It appears that at the meeting of the Commissioners on the 28th June, 1922, two resolutions were moved and seconded. The first resolution was " That the question of a general revision of assessment be postponed for a year in view of the economic distress prevailing in the country, and that all new and improved buildings which had escaped notice be assessed first, and the Vice-Chairman be requested to undertake the work." The second resolution was in the terms already set forth as having been passed. The complaint of the appellant is that under the bye-laws of the Municipality (Rule 16) the Chairman was bound to put these resolutions separately, whereas what he appears to have done was to put them as alternatives and ascertain the numbers in favour of each respectively. The Additional Munsiff of Dacca who tried the case, pointed out that the course adopted did not prejudice the plaintiffs or other ratepayers, and that they rather got the advantage of the two resolutions being fully considered together. He considered this irregularity as a mere defect of form under Section 358 of the Municipal Act, which did not invalidate the assessment. On appeal to the District Judge, he was of opinion that the procedure adopted was irregular, but that such irregularity was not sufficient to

- render null and void all action taken on the basis of the resolution. When the case came on appeal before the High Court of Judicature in Bengal this point, if not expressly abandoned, was not urged before the appellate court, and therefore no view was expressed upon it. Having regard to this fact, their Lordships do not think it necessary to examine the proceedings objected to in any detail or the effect of the subsequent actions taken from time to time for the purpose of giving effect to the resolution, and upon this point, which appears to be without any real substance, they are of opinion that the appeal fails.

The second contention of the appellant was that the rate was invalid because the Commissioners, before the result of the re-valuation had been ascertained and become known to them, sanctioned a budget framed on the basis of the old valuation and of the percentage at which rates had been for some years levied on that valuation, *i.e.* 10 per cent, being the highest percentage which the Municipal Act allowed. It is, however, in evidence that the re-valuation list was subsequently signed by the Chairman and deposited in the office on the 28th March, 1923, and notice was published on the same day. The Additional Munsiff of Dacca pointed out that section 102 of the Act provide that the percentage fixed shall remain in force until the order of the Commissioners determining such percentage, shall be rescinded and until the Commissioners at a meeting shall determine some other percentage on the valuation of the holdings at which the rate will be levied from the beginning of the next year, and he held there was no illegality on this ground, and the District Judge and the High Court, in fully considered judgments, affirmed the view of the Additional Munsiff.

Their Lordships think it unnecessary to further examine the arguments on which these judgments on this point are based, as they can find no reason for dissenting from the conclusions or the basis of the conclusions arrived at by these several courts.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

T. L. Wilson & Co : Solicitors for the Appellant.

Watkins & Hunter : Solicitors for the Respondents.

A. T. M.

Appeal dismissed.

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FULL BENCH.

*Before Sir George Claus Rankin, Knight, Chief Justice, Sir
Charu Chunder Ghose, Knight, Judge, Sir Philip L.
Buckland, Knight, Judge, Mr. Justice B. B.
Ghose and Mr. Justice M. N. Mukerji.*

SAYAMALI MOLLA

v.

ANISUDDIN MOLLA AND OTHERS*

Limitation—Limitation Act (IX of 1908), Sch. I. Arts. 132, 148—Suit for redemption—Rights of prior and subsequent mortgagees—Purchaser in prior mortgagee's decree—His right to redeem.

If a person is joined as a defendant for enforcement of the right under a mortgage, he should be dismissed from the action as soon as he sets up a prior title : *Nilkant v. Surash* (1).

When a puisne mortgagee is not made a party to a suit by the first mortgagee, his rights are not affected by a decree or sale thereunder and the puisne mortgagee has still the right to redeem the prior mortgagee : *Ram Narain v. Bendi* (2). He may notwithstanding the prior decree bring a suit on his mortgage : *Debendra v. Ramtaran* (3).

When the first mortgagee brings his suit without impleading the puisne mortgagee, obtains a decree against the mortgagor only and purchases the property himself, he purchases the outstanding interest of the mortgagor only and the puisne mortgagee's rights are not affected in any way : *Gopas Bundhee v. Kales Pado* (4). A suit by the puisne mortgagee, who purchased the property in execution of his mortgage decree, for redemption, is maintainable, if not barred by limitation.

A suit for redemption by a person entitled to redeem is governed by Article 148 Sch. I of the Limitation Act.

Defendant No. 1 brought his suit on his mortgage without impleading the plaintiff and obtained a decree for sale against the mortgagor alone on 30th November, 1911. Plaintiff brought a suit to enforce his mortgage in 1915. He made the present defendant a defendant in the suit along with the mortgagor

* Full Bench Reference No. 2 of 1929 in Letters Patent Appeal No. 105 of 1928 against the decision of Mr. Justice Dwarka Nath Mitter, dated the 10th September, 1928, affirming that of L. B. Chatterjee Esq., Additional District Judge, 1st Court, of 24-Parganas, dated the 6th August, 1927, affirming that of Babu Surendra Nath Sen, Munsiff, 3rd Court, of Diamond Harbour, dated the 1st October, 1926.

(1) (1885) L. R. 12 I. A. 171 ; I. L. R. 12 Calc. 414.

(2) (1904) I. L. R. 31 Calc. 737.

(3) (1903) I. L. R. 30 Calc. 599.

(4) (1875) 23 W. R. 338.

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and a transferee from him. The defendant set up his prior mortgage and plaintiff's suit as against him was dismissed as the plaintiff did not ask for any decree against him. The plaintiff obtained the usual decree for sale as against the other defendants in that suit on 8th May, 1915. Defendant in execution of his decree purchased the mortgaged property himself on 15th August, 1916, and obtained possession. Plaintiff afterwards in execution of his decree purchased the property on 19th November, 1920 but obtained possession only of plot No. 3 of the mortgaged property :

Held, that the suit by the plaintiff for redemption of plot No. 1 of the mortgaged property on payment of the mortgage money due on the mortgage of defendant and for possession, was governed by Article 148 and not by Article 132, Sch. I of the Limitation Act and was not barred : *Nidhiram v. Sarbessur* (1) explained.

The defendant's right to redeem the plaintiff would depend upon the question as to the preferential right to the equity of redemption under the respective sales under the decrees obtained by the parties on their mortgages.

Appeal by the Plaintiff.

Suit for redemption.

The material facts are stated above and in the following order of Reference by Sir George Claus Rankin C. J. and by Sir Charu Chunder Ghose, Judge.

Rankin C. J. :—In 1904 Bainuddin mortgaged the suit land to the first defendant who may be referred to as "the defendant." In 1908 he gave another mortgage of it to the plaintiff. In 1911 the defendant sued to enforce his mortgage but did not implead the plaintiff. He got a decree for sale on 30th November, 1911. In 1915 the plaintiff, without impleading the defendant obtained a decree for sale in a suit to enforce the second mortgage. The defendant in 1916 became auction-purchaser under his decree and the plaintiff in 1920 did the like. The plaintiff in 1925 sued to redeem the first mortgage.

All three Courts have held that the suit is barred by Art. 132 of the First Schedule to the Limitation Act, 1908. They have followed a decision of this Court in *Nidhiram v. Sarbessur* (1), a decision which has been followed once at least in this Court : *Nilmadhab v. Joy Gopal* (2), and in Madras more than once, but has been dissented from in *Ramjharl Koor v. Lala Kasinath* (3). It is also inconsistent with *Priya Lal v. Bohra Champa Ram* (4), and was doubted in *Basanta v. Indore Singh* (5).

(1) (1909) 14 C. W. N. 439.

(2) (1925) 91 L. C. 719.

(3) (1926) I. L. R. 5 Pat. 513.

(4) (1922) I. L. R. 45 All. 268.

(5) (1920) 2 Lah. L. J. 419.

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The propositions to be examined are (1) that a suit by a second mortgagee to redeem the first is a suit to enforce payment of money charged upon immovable property (Art. 132); (2) that it is not a suit against a mortgagee to redeem (Art. 148). The learned Judge who tried this case in Second Appeal lays stress upon the principle that the right of a mortgagee to redeem is only ancillary to his right "to work out his remedy against the mortgaged estate by foreclosure. He has not however considered the bearing of this principle on a case where the puisne mortgagee has already foreclosed so that his debt has been discharged and his charge no longer exists (C. P. C. O. 34 R. 3).

A reference to the passage quoted by the learned Judge from Fisher on Mortgages (para. 1448) and to the cases cited therein will show that the reason why, to a suit by a puisne mortgagee to redeem a prior mortgage, the mortgagor is a necessary party is that the form of decree in such a case is that the second mortgagee redeems the first and that thereupon the mortgagor must redeem the second or stand foreclosed: the mortgagor on this footing is interested not only in any account which may be taken but otherwise—namely to preserve his property. In a simple case in which the second mortgagee has already foreclosed and cut off his mortgagor's equity of redemption, it would seem however that he redeems the first mortgage as owner.

The reasoning in *Naldiram's* case (1) had reference to the facts that the sale under the decree upon the first mortgage was in 1893 and that under the decree on the second mortgage was in 1895, the suit by the second mortgagee having been instituted in 1894. It was partly directed to answering a contention that Art. 134 applied to give the plaintiff 12 years from the date of his purchase. On that point it was said: "The second mortgagee by his purchase at the sale in satisfaction of his mortgage debt cannot acquire any right of redemption which he had not as mortgagee." On the question of Art. 148 the only reasoning is this—"The omission of the prior mortgagee to include the second mortgagee in his suit has been held by this Court not to deprive the second mortgagee of his right to redeem the prior mortgage but it cannot be held that this interpretation of the law, which is intended merely to save his right as second mortgagee gives him any additional right or extends the period during which, under the law he can sue to enforce his rights."

(1) (1909) 14 C. W. N. 439.

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The question is what is the period during which, under the law a mortgagee can sue to enforce his right of redemption. In my opinion that is stated *prima facie* by Art. 148. No doubt if a mortgagee does not within 12 years of the due date sue to enforce his mortgage he ceases to be a mortgagee and in that event the foundation of his right to redeem will be gone. But if within the time allowed by law he does sue to enforce his mortgage, let us say, by foreclosure; if he impleads all proper parties (prior encumbrancers are not even proper parties when the sole object of the suit is to cut off the equity of redemption); and if he gets a decree, let us again say for foreclosure; I do not see why he cannot thereafter bring a suit for redemption without impleading the quondam mortgagor at any time within sixty years from the due date of his own mortgage. If the prior mortgagee has sued to enforce his security without impleading the puisne mortgagee neither the decree nor the sale (if there is one) will affect the right of the second mortgagee to redeem. It does not matter whether the failure to implead the puisne mortgagee is explained by ignorance of his existence or by default or design; and the respective dates of the decrees do not determine the existence or non-existence of the right to redeem.

Does it then make any difference that suit by the second mortgagee was a suit for sale? I think not. In *Har Pershad Lal v. Datmardan* (1), Mitra, J. said: "The decree obtained by the first mortgagee is valid in law.....notwithstanding that the present defendants were not impleaded..... It was however imperfect, and the sale under it had the same imperfection, the right of the defendants to reopen the decree and the sale proceedings continuing to exist." When in that position a sale is held under the second mortgagee's decree [and such a sale is valid and within his rights: *Dehendra v. Ramtaran* (2)] the purchaser whether he be the second mortgagee himself or a stranger gets (*prima facie* at all events) the title of the mortgagor at the date of the second mortgage—that is, he gets the property subject to the first mortgage: not for all purposes in the sense that he can ignore the sale under the first mortgage (one cannot always ignore transactions between third parties) but in the sense that he becomes an owner of property subject to an incumbrance and the right to redeem that incumbrance is not ousted by the previous sale. He cannot claim as against the first mortgagee or as against the purchaser under the

(1) (1905) I. L. R. 32 Calc. 891 (903).

(2) (1903) I. L. R. 30 Calc. 599 (F. B.).

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first decree to get or to retain possession without paying off the incumbrance. He can claim to get the property on redeeming the incumbrance. He does not have in either case to sue the mortgagor for any money or to enforce any charge for the payment of money. He has not got a charge and he may not even be a creditor. It is the first mortgagee or his purchaser who can be treated as if his title were no more than a charge for money.

Whether and in what circumstances if any the first mortgagee if he gets into possession under his purchase can claim to lessen the period prescribed by Art. 148 by alleging adverse possession is a question which does not arise in this case.

The learned Judge very properly followed the previous decisions in this Court but I think that this case should be referred to a Full Bench. The questions for consideration I would state thus :—

Whether Art. 132 applies to this case ?

Whether *Nidhiram's case* (*supra*) (1) was rightly decided ?

Whether the suit is barred by limitation ?

The appeal is referred for the final decision of the Full Bench under the Appellate Side Rules Ch. VII, R. 2.

C. C. Ghose, J :—I agree.

Mr. Hiralal Chakravarti (with *Mr. Syamadas Bhattacharji*) for the Appellant :—To the present suit Art. 142 of the Limitation Act *prima facie* applies. For, so far as the puisne mortgagee is concerned, the prior mortgagee has not ceased to be the mortgagee *Umra v. Zahoor* (2), *Hetram v. Shadilal* (3), *Dehendra Narain v. Ramtaran* (4), *Maitra Mal v. Durga Kunwar* (5), *Sukhi v. Ghulam Safdar* (6). And it is a suit for redemption, as defined in Sec. 60 of the Transfer of Property Act viz., to tender the amount and to have a re-conveyance—Sec. 91(b) gives this right to the second mortgagee. Further, by my purchase I have stepped into the position of the mortgagor. *Prima facie*, also, Art. 132 does not apply, because—(1). I have ceased to be the holder of a charge—*Vasudeva v. Srinivasa* (7). My charge has merged in my decree, and by my purchase I have obtained the mortgagor's interest as at the date of the mortgage. Suppose an outsider had purchased : What would have been the period of limitation applicable to a suit for redemption by him ?

(1) (1909) 14 C. W. N. 439.

(3) (1918) 45 I. A. 130.

(5) (1919) 47 I. A. 71 ; 32 C. L. J. 121.

(7) (1907) 30 Mad. 426 P. C.

(2) (1890) 17 I. A. 201.

(4) (1903) 30 Cal. 599 F. B.

(6) (1921) 48 I. A. 465.

- Suppose it were a mortgage by conditional sale, and I had foreclosed, would the charge have subsisted? See Sec. 89 of the Transfer of Property Act. No doubt the section has been somewhat altered by the Code of 1908 in the case of sale, but that was in view of *Hetram v. Shadilal* (1), *Matru Mal v. Durga Kunwar* (2) and *Ramnarayan v. Sahadeo* (3). So far as the mortgagor is concerned, the law remains the same. Refers to Ghose's mortgage, p. 610; *Sheik Kalu v. Abhoy Charan* (4). The case in *Nidhiram v. Sarbeswar* (5) was not correctly decided.

[B. B. Ghose, J.—That case is distinguishable, because there the puisne mortgagee brought the suit after the prior mortgagee had purchased the property in execution of his decree.]

That is so.

Mr. Surendra Nath Basu for the Respondents :—Articles 132 of the Limitation Act would apply. The mortgage in the present case, being a simple mortgage, all its incidents, alleged rights to foreclose or sale or redeem must be governed by article 132 of the Limitation Act. A simple mortgage although it has been named so in the Transfer Property Act, is really a charge as contemplated by Art. 132 of the Limitation Act. The term mortgage in the Limitation Act does in fact apply to an English mortgage only: *Girwar v. Thakur Narain* (6). The case was followed in *Nilcomal v. Kamini Koemar* (7). The two cases which follow the same principle are *Sitab v. Hyder* (8), *Harah Chand v. Deonath Sahay* (9).

The very point came up at a later stage before their Lordships of the Judicial Committee in *Bashudeb v. Srinivasa* (10).

A right to redeem is co-extensive with and is limited by a right to foreclose, accordingly if a right to foreclose is barred after 12 years, a right to redeem is necessarily barred after 12 years. This principle of co-extensiveness was authoritatively laid down in *Prannath v. Reekha* (11). The same principle was approved of and applied in *Vadju v. Vadju* (12).

When a mortgagee instituted a suit on a mortgage bond and obtains a decree he is deemed to have waived whatever right he had under his mortgage, *Hetram v. Shadilal* (1).

(1) (1918) 45 I. A. 130.

(2) (1919) 47 I. A. 71.

(3) (1922) 1 Pat. 332.

(4) (1920) 25 C. W. N. 253.

(5) (1909) 14 C. W. N. 439.

(6) (1887) I. L. R. 14 Cal. 730 (F. B.).

(7) (1891) I. L. R. 20 Cal. 269.

(8) (1896) I. L. R. 24 Cal. 281.

(9) (1897) I. L. R. 25-Cal. 409.

(10) (1907) 34 A. 186.

(11) (1859) 7 M. I. A. 323.

(12) (1880) I. L. R. 5 Bom. 22.

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In section 89 of Transfer of Property Act, there was a clause that on the mortgagee obtaining a preliminary decree, the rights of a mortgagor to foreclose and all other rights under the mortgage will be extinguished, *Debendra Narain Roy v. Ramtaran Banerjee* (1) is a case decided on this section of the Transfer of Property Act. This section has since however been repealed and re-enacted without the proviso mentioned above in the Code of Civil Procedure Code 1908 under order 34 rule 5.

Commenting this omission their Privy Council observed in 48 I. A. p. 468 that the decisions made between the year 1882 and 1908 have all been wiped away by the omission of the said clause, and the law as it now stands should be deemed to be the law as stood before 1882. The net result therefore of the Full Bench decision in *Debendra Narain v. Ramtaran* (1) is of no validity as being a guide to the present law. It may be said that the Privy Council indirectly overruled the decision in 30 Cal.

Present attempt will now be made to ascertain the law as it stood before 1882. Relevant decisions are *Montasooddeen v. Raj Coomar* (2); *Gopet Bundhoo v. Kales Pudeo* (3); *Radhabenode v. Kripa Moyee* (4).

The trend of these decisions is that a second mortgagee has as a reality no further right against the first mortgagee after he obtains a decree on his second mortgage. He can exercise that right if and as ancillary to his rights to establish his security. Independently of such right he has no other right. He can exercise that right if he wants to establish his security.

It has been so held that a purchaser at a mortgage sale cannot be resisted by a second mortgagee claiming equity of redemption against him. Vide 16 I. A. p. 129, Dr. Ghose's mortgage 4th edition p. 586; Fisher's Law of Mortgage para 1448.

C. A. V.

The following judgments were delivered :—

July, 14.

B. B. GHOSH, J. :—The facts of the case giving rise to this Reference are these : One Bainuddin mortgaged a plot of land to the defendant No. 1 in 1904. In 1908 he again mortgaged this piece of land with another plot (No. 2 in the schedule of the plaint) to the plaintiff. Defendant No. 1 (who will be referred to as the defendant) brought his suit on his mortgage in 1911 without impleading the plaintiff and obtained a decree for sale against the

(1) (1903) 1 L. R. 30 Calc. 599 (F. B.).

(2) (1875) 14 B. L. R. 408 (F. B.).

(3) (1875) 23 W. R. 338.

(4) (1875) 14 M. L. A. 443.

- mortgagor alone on 30th November 1911. Plaintiff brought a suit to enforce his mortgage in 1915. He made the present defendant a defendant in the suit along with the mortgagor and a transferee from him. The defendant set up his prior mortgage and plaintiff's suit as against him was dismissed as the plaintiff did not ask for any decree against him. Plaintiff obtained the usual decree for sale as against the other defendants in that suit on 8th May, 1915. Defendant in this case put the property mortgaged to him to sale in execution of his mortgage decree and purchased it himself on 15th August 1916, and obtained possession.

Plaintiff afterwards executed his decree and purchased both the mortgaged properties on 19th November, 1920 but obtained possession only of plot No. 2. Plaintiff brought the suit out of which the appeal to this Court arose on 17th July 1925 for redemption of plot No. 1 of the plaint on payment of the mortgage money due on the mortgage of defendant and for possession. Defendant No. 2 is a brother of defendant No. 1 and defendant No. 3 is said to be a tenant under the other defendants. These two may be left out of consideration.

Various points were raised in defence by the written statement of the first two defendants. Defendant No. 3 did not appear. All the Courts have thrown out the suit on the ground that it is barred by limitation, and this question has caused the Reference to the Full Bench.

All the three Courts concurred in holding that the suit was barred under Article 132 of the Limitation Act purporting to follow a decision of this Court in *Nidhiram v. Sarbessur* (1). The questions referred to the Full Bench are :—

- (1) Whether Article 132 applies to this case.
- (2) Whether *Nidhiram's* case (1) was rightly decided
- (3) Whether the suit is barred by limitation.

I think it necessary to make some preliminary observations as to the rights of the parties under the circumstances stated above. It seems to have been suggested that plaintiff's right has been affected in some manner as he did not redeem the defendant when he brought his suit. Under Order XXXIV, rule 1 of the Civil Procedure Code a puisne mortgagee may sue for sale without making a prior mortgagee a party to the suit. No doubt if he seeks to redeem a prior mortgagee in his suit for sale he may make the prior mortgagee a party and a complete decree may then be made as in Form No. 8 Appendix D of the Civil Procedure Code.

(1) (1909) 14 C. W. N. 439.

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But if a person is joined as a defendant for enforcement of the right under a mortgage he should be dismissed from the action as soon as he sets up a prior title. [See *Nilakant v. Suresh* (1)]. The fact that plaintiff's suit on his mortgage was dismissed as against defendant does not affect his right of redemption if it is not extinguished in any other manner.

When a puisne mortgagee is not made a party to a suit by the first mortgagee his rights are not affected by the decree or sale thereunder, and the puisne mortgagee has still the right to redeem the prior mortgage: *Ram Narain v. Bandi* (2). He may notwithstanding the prior decree bring a suit on his mortgage: *Debendra v. Ramtaran* (3). The rights of rival purchasers when the first mortgagee brings his suit without impleading the puisne mortgagee, obtains a decree against the mortgagor only and purchases the property himself and the mortgaged property is sold a second time at the instance of the puisne mortgagee and purchased by himself were considered in the case of *Gopes Bundhoo v. Kales Pudo* (4). The purchaser under the first decree purchases the outstanding interest of the mortgagor only and the puisne mortgagee's rights are not affected in any way. It should be noted that in the present case the puisne mortgagee seeks to redeem as the purchaser of the equity of redemption and the suit of the plaintiff as against the mortgagor was properly constituted, for when he brought suit the equity of redemption of the mortgagor had not passed away from him. There can be no question that the plaintiff would have the right to redeem if his suit is not barred by limitation.

Now I shall consider the question as to which article of the Limitation Act is applicable to this suit for redemption. Plaintiff's suit has been dismissed on the ground that Article 132 of the Act is applicable to this case. That article refers to a suit 'to enforce payment of money charged upon immoveable property'. In my judgment by no straining of language can a suit for redemption fall under that article, as it is not a suit to enforce payment of money. The special article applicable to a suit for redemption is Article 148, which gives sixty years as the period from the date when the right to redeem accrues. In this case the due date under the first mortgagee's bond is not in evidence but the suit was brought within sixty years of the date of the mortgage. So if this article is applicable there is no question that the suit is within time and is not barred by limitation.

(1) (1885) L. R. 12 I. A. 171; I. L. R. 12 Calc. 414.

(2) (1904) I. L. R. 31 Calc. 737.

(3) (1903) I. L. R. 30 Calc. 599.

(4) (1875) 23 W. R. 338.

But it is said that the case of *Nidhiram v. Sarbassur* (1) is authority for the proposition that Article 132 applies to this case. It seems to me that if the facts of that case are properly analysed it would appear that the learned Judges did not profess to lay down any such rule. There the suit on the first mortgage was brought on 28th March 1892 and the sale at which the mortgagee purchased was held on 21st March 1893. The puisne mortgagee was not made a party to the suit. The first mortgagee sold his interest to another person on 14th July 1893. The puisne mortgagee then brought his suit on 6th November 1894, that is to say after the proceedings in the suit on the prior mortgage had been brought to an end and himself purchased the property at the sale on 20th July 1895, without making the previous purchaser a party to the suit. In the result the owner of the equity of redemption not being impleaded the only right that was transferred by the decree on the puisne mortgage and the sale thereunder was the right under the plaintiff's own mortgage. The second mortgagee could no doubt bring a fresh suit against the owners of the equity of redemption to enforce his mortgage within the period of limitation, which suit would be governed by Article 132 of the Limitation Act. But he did not do so. He brought a suit after his right to enforce his mortgage was barred, for a declaration of his right to redeem the prior mortgage. The question which the learned Judges were asked to consider was, whether "the time within which the second mortgagee who has purchased the property in execution of a decree in a suit subsequently brought by him, to enforce his mortgage, or as in this case, his transferee, has to bring a suit, commences to run from the due date of the mortgage debt or from the date of his purchase." They held, as in my opinion rightly that limitation to enforce his mortgage would run from the due date on the mortgage. The learned Judges proceed to say, "The second mortgagee, by his purchase at the sale in satisfaction of his mortgage debt cannot acquire any right of redemption which he had not as mortgagee." I think what they meant was, as the right to enforce the puisne mortgage was barred by limitation, the transferee from the mortgagee had no right in the property to enable him to redeem the prior mortgage. The same observation was made by the learned Chief Justice in his order of Reference, with which I fully agree. It is unfortunate that the language used by the learned Judges in *Nidhiram's case* (1) lends itself to misconception if dissociated

(1) (1909) 14 C. W. N. 439.

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from the facts of the case. But I think they never meant to lay down a rule of limitation for an action to redeem which is not warranted by the provisions of the Limitation Act. It seems to me what they intended to say was that the plaintiff had no subsisting right to redeem.

I do not consider it necessary to elaborate the discussion but it seems to me whenever a suit for redemption is brought by a person entitled to redeem against a mortgagee Article 148 of the Limitation Act and no other article applies to it.

I have now only to refer to Fisher on Mortgages (para 1448) cited by the learned Judge who first tried the case in second appeal. The learned Chief Justice has pointed out the reason why in England the mortgagor is a necessary party to a suit by a puisne mortgagee to redeem the prior mortgagee. The cases cited in Fisher show that the reason of the rule that if a puisne mortgagee seeks to redeem he must foreclose all subordinate rights including the ultimate equity of redemption, is that the right to redeem of those persons would otherwise remain open, thus exposing the prior mortgagee to another suit. Where, as in this case, the puisne mortgagee has already obtained a decree on his mortgage he is entitled to redeem a prior mortgagee in a subsequent suit. The law in England is thus stated in Fisher on Mortgage para 1693; "the second or other puisne mortgagee may foreclose those subsequent without joining those prior to themselves, for the latter can suffer no damage. The subsequent mortgagees, it is true, are left without the opportunity of redeeming all prior to them in the *same suit*."

The answers I propose to the questions put to us are:—

1. No. Article 148 is applicable.

2. *Nidhiram's case* (1) was rightly decided on its facts. If however it is supposed that it was decided in that case that a suit for redemption such as this is governed by Article 132, then it was wrongly decided.

3. The suit is not barred by limitation.

The case has been referred to this Bench for a final decision. But the suit having been dismissed on the ground of limitation the other issues raised in the case have not been decided by the Courts below, and no other question was argued before us. None of the parties however examined any witness at the trial. The questions therefore which now require decision are covered by Issues Nos. 4 and 5, and the case should be remitted to the trial Court

- for decision of those issues. Reference may be made to the cases of *Umesh v. Zahoor* (1) ; *Sukhi v. Ghulam* (2) ; *Jnanendra v. Skorashi* (3), regarding the rights of the parties subsisting under their respective mortgages.

The defendant has claimed to redeem the plaintiff in his turn and his right to redeem the plaintiff would depend on the question as to the preferential right to the equity of redemption under the respective sales held under the decrees obtained by the parties on their mortgages. In deciding that question reference may be made to the following cases : *Gopal Bundhoo v. Kales Pudo* (4) ; *Dirgopal v. Bolakes* (5) ; *Ram Narain v. Bandi* (6), if the defendant is held entitled to redeem he would be able to do so on payment of a proportionate part of the mortgage money chargeable on plot No. 1, as the plaintiff has himself purchased a portion of the property under his mortgage viz. plot No. 2. It would then be necessary to take evidence as to the respective value of the two plots. The case should be finally determined by the trial Court after taking into consideration all the circumstances.

The appellant must get his costs of the second appeal to this Court, of the Letters Patent Appeal and of this Reference.

Rankin, C. J. :—I agree with the judgment of Mr. Justice B. B. Ghose and have only to make clear that the observations made by me in the order of Reference are to be taken to be superseded by this judgment.

C. C. Ghose, J. : I agree with the judgment delivered by Mr. Justice B. B. Ghose.

Buckland, J. : I also agree.

Mukerji, J. : I also agree.

A. T. M.

Appeal allowed : Case remanded.

(1) (1889) L. R. 17 I. A. 201 ; I. L. R. 18 Calc. 164.

(2) (1921) L. R. 48 I. A. 465 ; I. L. R. 43 All. 469.

(3) (1922) I. L. R. 49 Calc. 626.

(4) (1875) 23 W. R. 338.

(5) (1879) I. L. R. 5 Calc. 269.

(6) (1904) I. L. R. 31 Calc. 737.

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APPELLATE CIVIL

*Before Sir George Claus Rankin, Knight, Chief Justice,
and Mr. Justice M. N. Mukherji.*

JALEKHA BIBI AND ANOTHER

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DANIS MAHAMMAD AND OTHERS*

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May, 28, 39.

Valuation—Memorandum of appeal—Court-Fees Act (VII of 1870), Secs. 7, 9, 10, 12—Valuation, evidence of—Charts of land value—Evidentiary value.

In the case of suits for possession of land, under section 7 of the Court-Fees Act, the subject matter is to be valued according to the market value and the fee is to be computed according to the market value. Whether the fee paid is sufficient or not, it is impossible to tell without travelling outside the plaint or the memorandum of appeal.

In the ordinary way, a Court to which a document such as a plaint or a memorandum of appeal is presented will not reject the document unless it has proof that the document is insufficiently stamped. When the Court is satisfied that the document is under-valued, it may require a further payment, and, on the further payment not being made, it may reject the plaint.

In a suit for possession of land, the plaintiff should not be called upon to give evidence on the question of value merely in order to get his document upon the file, before the plaint or memorandum of appeal can be registered.

For cases of the class which depend upon the valuation, the particular and appropriate provisions of section 9 of the Court-Fees Act should always be used.

If the Court wants the question of under-valuation to be pursued, it should undertake the investigation in a judicial manner. Under section 9 of the Court-Fees Act, the Court is to issue a commission to any proper person directing him to make local or other investigation and to report to it. The Judge then has a judicial duty to come to a decision on the basis of the Commissioner's report. Such a commission is a commission under the Civil Procedure Code and what the Commissioner may do and what the duty of the Judge is, is laid down in the Civil Procedure Code.

The mere fact that a Court can issue a commission shows that the Court can make itself judicial enquiry if it so minded: *Heri Ram v. Akbar* (1).

The investigation as to valuation for the purpose of court-fee should not

* Appeal from Appellate Decree No. 1205 of 1927, against the decree of J. Pringle Esq., District Judge of Tipperah, dated the 25th January, 1927, affirming that of Babu Gopal Chandra Biswas, Munsiff, 3rd Court, at Comilla, dated the 24th November, 1926.

* For another case of this sort decided by the same learned District Judge, See 49 C. L. J. 562—Rep.

(1) (1907) I. L. R. 29 All. 749 (F. B.),

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be embarked upon without due reason. The appointment of a Commissioner under section 9 of the Court-Fees Act is discouraged as it is very apt to be oppressive to the plaintiff.

If an investigation is undertaken by the Judge himself, it is entirely wrong to suppose that the plaintiff has first to give evidence to satisfy the Court of the propriety of his valuation before he is entitled to get the plaint or memorandum of appeal registered. The proper course is to deal with the matter when the plaint or the memorandum of appeal has been filed.

The plaintiff brought his suit for possession of certain land exceeding 3 kanks in area and valued the land at Rs. 150. No question was raised by the defendant as to the sufficiency of the valuation. The suit was dismissed by the primary Court for failure of the plaintiff to prove his title to the land claimed. The plaintiff appealed and upon that appeal being presented, the learned District Judge appeared to have examined into the question of valuation. The plaintiff valued the appeal as he had valued his suit at Rs. 150. The learned District Judge was desirous of requiring the plaintiff to prove that the memorandum was sufficiently valued. He required the plaintiff to show the nature of the land by filing a map and Khatian. He asked the lower Court to explain its valuation. The defendant produced a Kobala which as evidence of value did not satisfy the learned Judge. As the appellant did not give evidence of the sufficiency or correctness of his valuation, the learned District Judge raised the valuation to Rs. 300 both for the purpose of the memorandum of appeal and for the purpose of the plaint. The learned Judge did that without there being any evidence before him at all on which he was entitled to act :

Held, that as it was not clear from the plaint or the memorandum of appeal itself that there had been an under-valuation, the reasonable course was to register the plaint or the memorandum of appeal and take appropriate steps thereafter for enquiring into any matter that called for enquiry.

That there was no illegality in any reference to a chart of land value or to a gazetteer or to any thing else that would assist. It was not a question of judicial decision.

That the chart of land value should not be put upon the parties as though it were evidence in itself and any judicial officer acting in a judicial matter upon such chart was acting without evidence before him.

That the learned Judge in refusing to permit the appeal to be filed unless the plaintiff pay further fees in respect of the document in the lower Court followed a practice which was not to be commended and which was of an extremely doubtful nature.

That the learned Judge should have registered the memorandum of appeal on the fee which was paid and, after he had done that, if he had any uneasiness as to the revenue having received its proper dues, he might take appropriate action under the appropriate section, namely, section 9 of the Court-Fees Act by appointing a Commissioner, if he thought fit or by holding a judicial enquiry himself. When that was done, if it turned out that the plaintiff had over-valued his claim, he would get the benefit, but if it was under-valued, the course prescribed by the statute would have to be followed.

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That he could reject the memorandum of appeal under the second half of section 12 of the Court Fees Act: *Shama Secondary v. Hurre Secondary* (1).

The practice in the High Court when a document in the lower Court was under-valued is laid down in *Bishu Bhutan v. Kala Chand* (2).

Appeal by the Plaintiffs.

Suit for possession of land.

The material facts appear from the judgment of the learned Chief Justice.

Mr. Ramdoyal Dey for the Appellants.

Mr. Mahammad Nurul Hug Choudhury for the Respondents.

The judgments of the Court were as follows:

May, 29.

Rankin, C. J.—In this case the plaintiff brought his suit before the third Munsiff at Comilla for possession of certain land exceeding 3 kanis in area. He valued the land at Rs. 100. When the matter came before the officer of the Munsiff's Court dealing with the reception of plaints, that officer compared the valuation with the valuation appearing on a certain chart of land values with which apparently the Munsiff's office had been provided as a guide to the question whether plaints were being properly valued or not. This document is referred to as the suits valuation chart. It is not a document which is in any way evidence but it would appear to be a document with which the officers of the Courts in Tipperah are provided by way of administrative assistance in the discharge of their duties. The Munsiff on the matter being drawn to his attention found that the valuation of Rs. 100 was low; but, on the ground that the land was said to be an accretion to the river Goomti and to be submerged, he ordered the plaintiff to increase the valuation to Rs. 150 and, on that being done and the deficit court-fee being paid, the plaint was duly registered. Thereafter, the case went to trial and the plaintiff's suit was dismissed—the Munsiff holding that the plaintiff had not shown title to the land claimed. No question was raised by the defendant as to the sufficiency of the valuation. Thereupon, the plaintiff appealed to the learned District Judge of Tipperah and, upon that appeal being presented, the learned District Judge appears to have examined into the question of the valuation. The plaintiff valued the appeal as he had valued his suit in the trial Court at Rs. 150. The learned District Judge recorded the following order before he registered the memorandum of appeal: "Plaintiff appellant must show nature of land, filing map and Khatian. Ask lower Court to explain valuation by 5.1.27." On the 5th of January, the Judge recorded:

(1) (1881) I. L. R. 7 Calc. 348.

(2) (1926) 31 C. W. N. 1045.

“Read lower Court’s explanation. Appellant explains valuation with production of a Kobala but without the copies of map and Khatian. The land is said to be a new formation; but I have not been given the help I asked for, namely, the map and Khatian. I do not think that the Kobala of 1328 is a safe guide. I raise the valuation to Rs. 300 and deficit fees must be paid on that for both Courts by 25th January, 1927.” Again, on the 25th of January, the following order was recorded: “Appellant submitted a further explanation; the court-fees have not been paid. The appeal is dismissed.” The plaintiff now appeals from this order of dismissal.

It may be as well to deal with this matter logically. One has to ask oneself what is the duty imposed by this fiscal legislation upon the plaintiff. The first thing is that, by section 6 of the Court-fees Act, it is provided that no document of any of the kinds specified as chargeable in the first or second schedule shall be filed, exhibited or recorded in any Court of Justice unless there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee. In the first article of the first schedule, we find that memorandum of appeal not otherwise provided for in the Act is mentioned as one of the documents which are charged with payment of a court-fee and, in the second column of that article, various amounts are specified. When the amount or value of the subject matter in dispute does not exceed so much, then a certain fee is to be paid and when it does exceed that figure but does not exceed a larger figure mentioned, then another fee is to be paid. Having got so far, we find that the document cannot be filed or registered in default of payment of court-fee because it is a document on which a fee is to be paid according to the amount or value of the subject matter in dispute. That takes us at once to section 7 of the Court-fees Act. Section 7 is a section which tells us, both with regard to plaint and also with regard to memorandum of appeal, how are we to arrive at the value of the subject matter in dispute. It explains, in the case of suits for possession of land as the present is, that the subject matter is to be valued according to the market value and the fee is to be computed according to the market value. It is clear enough that it does not always happen that the matter in dispute is the same in the trial Court as in the Court of appeal because sometimes the appeal is against a part only of the original claim. But, even so, in cases like the present, it is section 7 which determines the computation of the value of the matter in dispute for the purpose of court-fee,

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Having got so far, we know, therefore, that a memorandum of appeal should not be filed or exhibited unless it contains a proper fee computed upon the market value of the subject matter in dispute. There are many cases in which it is possible to say that the plaint or the memorandum of appeal is under-valued without having to take evidence or to consider extraneous facts. It may be that a claim for possession of land is valued as though it were a mere declaration and there are all sorts of other ways in which without going outside the plaint itself or the memorandum of appeal it is possible to say that the value has been underestimated; and, in all such cases, no doubt, it is the clear duty of the Court to whom the document is presented to refuse to accept it until the proper fee has been paid. In cases, however, where the sufficiency of the fee depends upon the market value of certain property, it is impossible to tell without travelling outside the plaint or the memorandum itself whether the fee is sufficient or not. Now, the provisions of the law make a difference, as it seems to me, with regard to those cases which I have last referred to because section 9 and the consequential sections are particular provisions in the Court-Fees Act which deal with this very class of cases—the class of cases, namely, where the sufficiency of the fee depends upon matters which require a certain amount of external investigation. Section 9 says that when the Court sees reason to think that the annual net profits or the market value of any such land as is mentioned in section 7 paragraphs V and VI have or has not been wrongly estimated, then the Court may take certain steps. Now, in the ordinary way, a Court to which a document such as a plaint or a memorandum of appeal is presented will not reject the document unless it has proof that the document is insufficiently stamped. Under order VII rule 11 Code of Civil Procedure, it is provided that the plaint shall be rejected in the case where the relief claimed is under-valued and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court fails to do so. So, in such a case as is there contemplated, the Court has to be satisfied that the relief is under-valued. When that is the case, it may require a further payment and, on the further payment not being made, it may reject the plaint.

In the present case, what happened was that the learned Judge to whom the memorandum of appeal was presented was, to begin with, desirous of requiring the plaintiff to prove that the memorandum was sufficiently valued. He required the plaintiff to show the

nature of the land by filing a map and Khatian. He asked the lower Court to explain its valuation. The appellant produced a Kobala which as evidence of value did not satisfy the learned Judge. Because the appellant did not give evidence of the sufficiency or correctness of his valuation, the learned Judge raised the valuation to Rs. 300 both for the purpose of the memorandum of appeal and for the purpose of the plaint. The learned Judge did that, it is clear, without there being any evidence before him at all on which he was entitled so to act.

In my opinion, there is more than one mistake in the course adopted by the learned Judge. If it is not clear from the plaint or the document itself that there has been an under-valuation, the reasonable course, whether one looks to the Code of Civil Procedure or to the Court-Fees Act, is to register the plaint or the memorandum and take appropriate steps thereafter for enquiring into any matter that calls for enquiry. It is clear enough under order VII of the Civil Procedure Code that the power to reject a plaint arises only upon it being seen that the plaint is under-valued. In my judgment, it never was intended in a case of this class that, before a plaint or a memorandum of appeal could be registered, the plaintiff should be called upon to give evidence on the question of value merely in order to get his document upon the file. In this case, the learned Judge had no evidence at all as to the value of the land in dispute. He refused to let the memorandum of appeal be filed not because he had come to a decision upon evidence that there had been an under-valuation but because he tried to put upon the plaintiff a preliminary burden of proving to his satisfaction that the valuation was sufficient and the plaintiff had failed to do so. Having done that, his next step was, being dissatisfied with the plaintiff's evidence, to act without evidence in holding that the valuation was insufficient. In my opinion, for cases of this class which depend upon valuation, the particular and appropriate provisions of section 9 of the Court-Fees Act should always be used. That, it will be observed, begins with the words "If the Court sees reason to think that the market value of any land has been wrongly estimated." Now, for the purpose of these opening words, there is no illegality in any reference to a chart or to a gazetteer or to anything else that will assist. This is not a question of judicial decision. The Court merely sees reason to think that the suit is under-valued and that by itself will hurt nobody. But if the Court wants this matter to be pursued and it is a matter upon which evidence of external fact is plainly necessary—the

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Court must undertake the investigation in a judicial manner. Section 9 points out one manner. It says that the Court may issue a commission to any proper person directing him to make a local or other investigation and to report to it. If that commission is issued and if a report is made, it is clear that then the learned Judge has a judicial duty to come to a decision on the basis of the Commissioner's report. Such a commission is a commission under the Civil Procedure Code and what the Commissioner may do and what the duty of the learned Judge is, is laid down quite clearly by the Civil Procedure Code. In the case of *Hari Ram v. Akbar Hussain* (1) it has been pointed out by the learned Judges that the mere fact that a Court can issue a commission shows that the Court can make itself a judicial enquiry if it is so minded. On the whole, I think that that proposition is sound, though the opening words of section 10 of the Court-Fees Act are rather against it. If, therefore, the learned Judge in this case having admitted the memorandum of appeal had taken steps under section 9 of the Court-Fees Act, I would have been prepared to say that he was within his rights, if he had held this judicial enquiry either himself or by means of a commission. The learned Judge held no such judicial enquiry. He did not purport to use the section which is expressly adopted to these cases of valuation of land. In my opinion, it is very necessary that these investigations should not be embarked upon without due reason. It will obviously be a hardship to the plaintiff that he should have an extra stage of litigation to go through before he can prosecute his suit. This Court has always discouraged—and I hope it always will discourage—the appointment of a commission under section 9 of the Court-Fees Act for the reason that it is very apt to be oppressive to the plaintiff. In particular, I would point out that, if a commission is ordered under this section—not at the instance of the plaintiff, there is no power to make the plaintiff deposit the costs of the commission. In the same way, if an investigation is undertaken by the Judge himself, it is, in my judgment, entirely wrong to suppose that the plaintiff has first to give evidence to satisfy the Court of the propriety of his valuation before he is entitled to get his plaint or memorandum registered. The proper course in these cases is to deal with the matter when the plaint or the memorandum has been filed. If the result of the enquiry is to the effect that the plaintiff's

(1) (1907) 1. L. R. 29 All. 749 (F. B.).

• valuation is insufficient, then the plaintiff may be called upon to make the necessary deposit, and section 10 shows that the suit is at first to be stayed and if necessary later on dismissed. There is one other matter in this case that requires to be considered. The learned Judge acted under section 12 of the Court Fees Act, that is to say, he not only rejected the memorandum of appeal unless Rs. 300 was the valuation put upon that, but he rejected the memorandum of appeal unless the fee upon Rs. 300 was paid upon the plaint. That he had only jurisdiction to do under the second half of section 12. In the first half of section 12, it is said that every question relating to valuation shall be decided by the Court in which the plaint or memorandum, as the case may be, is filed, and that such decision shall be final as between the parties to the suit. This is modified by the second clause which says: "Whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party to pay so much additional fee as would have been payable had the question been rightly decided." In this Court, the decision in the case of *Shama Soondary v. Hurro Soondary* (1) has been acted upon for over fifty years and I desire to say nothing whatever by way of disturbing the authority of that decision. The practice in the High Court is that where it is found that a document in the lower Court was undervalued the appeal in the High Court is admitted, provided that the proper stamp is paid upon the memorandum of appeal here. The question under the second half of section 12 as to making the party pay a greater sum as fee upon the document in the lower Court is dealt with after the appeal has been admitted and registered but before the appeal is allowed to be heard. The practice on that point has been laid down by my learned brothers Mr. Justice Mukerji and Mr. Justice Graham in the case of *Bidhu Bhushan Bakshi v. Kala Chand Roy* (2) which in my opinion, deserves to be regarded as an authoritative statement of the practice of this Court and of the proper practice under section 12. The word "filed" in section 12 occurs only in the first half and not in the second half and, even if there is room for the contention that the phrase "Whenever any such suit comes before a Court of appeal" is satisfied when the memorandum is presented and before it has been accepted or registered, even so it is plainly much the better practice that these

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(1) (1881) 1 L. R., 7 Cal. 348.

(2) (1926) 31 C. W. N. 1045.

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contentious questions as to documents in the lower Courts should be dealt with when the memorandum of appeal has been accepted and registered and should not be dealt with as a condition of the acceptance or registration of the memorandum of appeal. In my opinion, the learned Judge in this case in refusing to permit this appeal to be filed unless the plaintiff paid further fees in respect of the document in the lower Court followed a practice which is not to be commended and which is of an extremely doubtful nature. In my judgment, this case has not been properly dealt with. The appeal must, therefore be allowed and the case must be sent back to the District Court from which it comes and the learned Judge must be directed to proceed according to law; that is to say, he is directed to admit and register the memorandum of appeal on the fee which has been paid and, after he has done that, if he has any uneasiness as to the revenue having received its proper dues, he may take appropriate action under the appropriate section, namely, section 9 of the Court-Fees Act by appointing a commissioner if he thinks fit or, as I have explained, by holding a judicial enquiry himself. When that is done, if it turns out that the plaintiff has over-valued his claim, he will get the benefit. If it turns out that the plaint is under-valued the course prescribed by the statute will be followed.

I say nothing in this judgment as to the advisability of the practice of making out charts which are supposed to show minimum values of lands of different classes in different parts of the district. From what I have learnt of such charts in the case of two districts, I have the gravest doubt as to the advisability of such charts being employed—particularly when they are put together merely by persons appointed to that rather difficult task by the District Judge. That, however, is an administrative matter and I do not decide that such chart may not be used for the purpose of the opening words of section 9 of the Court-Fees Act, but I would draw the attention of all District Judges and Judicial officers to this that such charts cannot and must not be put upon the parties as though they were evidence in themselves and any judicial officer acting in a judicial matter upon such charts is acting without evidence before him.

The appeal, therefore, must be allowed with costs.

Mukerji, J :—I agree.

A. T. M.

Appeal allowed.

*Before Sir George Claus Rankin, Knight, Chief Justice, and
Mr. Justice Commiato.*

HARAN CHANDRA KARMAKAR

v.

KISHORI LAL GHOSH.*

CIVIL.

1927.

May, 19.

Kabuliat—Material alteration—Proof of suspension of rent—Proof of additional rent for excess land—Presumption arising under Bengal Tenancy Act (VIII of 1885), Sec. 50, rebuttal of.

Whenever any instrument is purposely altered by a person in lawful possession of it in a material part of it, the instrument is void for the purpose of enabling any person to sue on it or to defend himself by using it as a direct defence depending on its obligatory force as an instrument: *Master v. Miller* (1).

A landlord in a proceeding under section 105 of the Bengal Tenancy Act, put forward a Kabuliat and asked for Rs. 5 to be allowed because that sum was, on the basis of the terms of the Kabuliat, a suspension of rent on account of 3½ bighas of the holding being submerged under water at that time. He asked secondly for enhancement of rent because of rise in the price of the crops and thirdly additional rent for additional area. The Kabuliat showed that the *jama* was created in 1875. In that Kabuliat there was an interpolation, "Measurement of the land will be made in accordance with the terms of the Kabuliat by a *rasi* of 80 cubits, 1 cubit being equal to 18 inches".

Held, that the Kabuliat was not evidence at all on the part of the landlord as regards Rs. 5 the suspended rent, as to additional rent for excess area, and as to rise in the price of staple crops.

That the Kabuliat could not be used to show the origin of the tenancy to rebut the presumption arising under section 50 of the Bengal Tenancy Act.

Appeal by the Defendant and Cross-objection by the Plaintiff.

Proceeding under section 105 of the Bengal Tenancy Act.

The material facts appear from the judgment of the learned Chief Justice.

Dr. Radha Binode Pal and *Babu Bhupendra Kumar Basu* for the Appellant.

Mr. Samarendra Nath Dutta and *Babu Tarakeshwar Nath Mittal* for the Respondent.

The following judgments were delivered:

*Appeal from Appellate Decree No. 2096 of 1924, and Cross-appeal No. 119 of 1925, against the decrees of M. C. Ghose Esq., Special Judge of Jessore, dated the 1st August, 1924, affirming that of Moulvi Sadru-ol-Asst, Assistant Settlement Officer at Jessore, dated the 26th June, 1923.

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Rankin, C. J. : In this case the question arises in a proceeding before the Assistant Settlement Officer under section 105 of the Bengal Tenancy Act. The position is quite shortly this that the plaintiff has three causes of action. He puts forward a kabuliati as being the governing document of this tenancy and he asked first of all for Rs. 5 to be allowed because that sum of Rs. 5 was, on the basis of the terms of the kabuliati, a suspension of rent on account of $3\frac{1}{2}$ Bighas of the holding being submerged under water at that time. He asked secondly for enhancement of rent because of rise in the price of the crops and he asked thirdly additional rent for additional area. There can be no doubt that the claim for Rs. 5 is a claim based upon the kabuliati ; that appears from the plaintiff's own claim before the Settlement Officer. The question of excess land is plainly a claim based upon the kabuliati not because he could not get it but for the kabuliati under the Bengal Tenancy Act but because it is immediately necessary to enquire exactly what land was then comprised within the kabuliati, in order that one may know whether there has been an encroachment or not. The kabuliati contains the usual terms : " Whenever you so desire at any future time you will measure the land and for the land thus found out on measurement you will be competent to settle the Jama according to the rates prevailing for the different classes of land in the village " Now in that kabuliati there was an interpolation " measurement of the land will be made in accordance with the terms of this kabuliati by a *rusti* of 80 cubits, 1 cubit being equal to 18 inches." It all depends upon the standard of measurement employed at the time of this kabuliati, what area was included in it and the plaintiff when he had his claim put forward under this kabuliati insisted upon it being accepted as the terms of the tenancy including the interpolation.

Now the question arises because the Lower Appellate Court has found that the kabuliati itself is not a forgery altogether, but that it is clear enough that this writing in the margin is a subsequent interpolation. In dealing with the kabuliati it appears that the interpolation must have been made by a person in whose possession the kabuliati was namely from the side of the landlord and the doctrine which is relied on in this appeal is the doctrine laid down in the case of *Master v. Miller* (1) a doctrine which has been stated in this way : whenever any instrument is purposely altered by a person in lawful possession of it in

(1) (1791) 4 T. R. 320

- a material part of it; the instrument is void for the purpose of enabling any person to sue on it or to defend himself by using it as a direct defence depending on its obligatory force as an instrument." These are the words used by Brett L. J. in *Suppl. v. Bank of England* (1).

The lower appellate Court has held that the tenant has proved that he has held the tenancy at an unvarying rate of rent for over 20 years and when the tenant appeals to the presumption under section 50 of the Bengal Tenancy Act the lower appellate Court holds that that claim would be good but for the fact that the kabuliati shows that the Jama was created in 1275.

We have therefore to consider whether this kabuliati may be used in connection with that point in connection with the question of Rs. 5 the suspended rent and the question of additional rent for the excess area. As the tenant has succeeded upon all the points except on the question of rise in the price of crops and *Haja*, we consider that aspect of the case first.

In my judgment this kabuliati in these circumstances is not evidence at all on the part of the landlord because it is the foundation first of all of his claim to the Rs. 5. In the second place I do not think it is any evidence on the question of the rise in the price of staple crops. *Prima facie* the tenant has a tenancy which would entitle him to the presumption that he held it at a fixed rate of rent since the Permanent Settlement. This document has been put forward in a claim for enhancement of rent as the foundation of the landlord's title to enhance the rent because in its absence the presumption under section 50 would take away the claim altogether. The landlord has been using the very terms of the kabuliati to show the origin of this tenancy to rebut this presumption; and to say that that can be distinguished from a case in which he is suing on the kabuliati is to my mind a distinction without difference.

The landlord takes his stand on this kabuliati as the origin of the tenancy and fails to prove it otherwise. The presumption under section 50 of the Bengal Tenancy Act therefore prevails against him.

In my judgment therefore the correct view is to allow the appeals by the defendant and to find that he has a tenancy the rent of which is not enhancible by virtue of the presumption under section 50 disregarding the kabuliati. In the same way the claim for Rs. 5 as charged is also disallowed. In my judgment the

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plaintiff's claim for excess rent for excess area must be disallowed, first of all it is impossible to make that case without putting in the kabuliat as the basis of the case; secondly it was with respect to this very matter that the interpolation was originally put in; and thirdly the claim laid was upon the document as altered and not upon the document as it originally stood.

In my judgment the principle of the case of *Master v. Miller* (1) should be enforced very strictly when the occasion for its application arises. In this case I think the result is that the defendant's appeals should be allowed with costs and the cross-objection of the plaintiff is dismissed with costs.

Cammlade, J. : I agree.

A. T. M.

Appeal allowed : Cross-objection dismissed.

(1) (1791) 4 T. R. 320.

CRIMINAL REVISION.

Before Sir Philip L. Buckland, Knight, Judge, Mr. Justice M. N. Mukerji, and Mr. Justice Graham.

ALI AKABBAR

v.

KASEMALI.*

CRIMINAL.

1929.

January, 7.
February, 1.

1928.

December, 20.

Revision—Enhancement of sentence—Application by complainant—Inadequacy of sentence :

Per Buckland, and Graham JJ : In a case where there is manifestly a ground for interference beyond all reasonable doubt, it matters not whether the case comes before the High Court of its own motion or at the instance of a private prosecutor or through any other channel whatever. In such a case the High Court will interfere.

Per Mukerji, J : Where an accused was convicted on his plea of guilty, an application by the complainant for enhancement of sentence unless backed by the Crown, is not entertainable : *Per Mukerji, J in Cr. Rev. Case No. 986 of 1928.*

Per Buckland, J : An application for enhancement of sentence should not

*Criminal Revision No. 1036 of 1928, against the order of J. K. Mukerjee Esq. Assistant Sessions Judge of Bakarganj, dated the 26th June, 1928.

- be encouraged at the instance of a complainant or private prosecutor unless it is clear beyond all question that it should be allowed: *Cr. Rev. Case No. 986 of 1928* dissented from.

Per Mukerji, J.: A sentence cannot be enhanced unless there has been a regular trial of the case in spite of the accused's plea of guilty: *The Superintendent and Remembrancer of Legal Affairs, Bengal v. Jnanendra* (1).

Application for Revision under section 435 of the Code of Criminal Procedure by the Complainant.

Application for enhancement of sentence.

The material facts appear from the judgment of Mr. Justice Graham.

Mr. Radhica Ranjan Guha for the Petitioner.

Mr. Suresh Chandra Talukdar for the Opposite Party.

C. A. V.

The following judgments were delivered :

Mukerji J. :—This Rule has been issued at the instance of the complainant in a case in which the accused has been convicted by the Additional Sessions Judge of Backergunge under section 304 (II), 326 and 148 Indian Penal Code and sentenced to undergo rigorous imprisonment for one year under section 304 (II) Indian Penal Code and for six months under section 148 Indian Penal Code the sentence to run concurrently, no separate sentence under section 326 Indian Penal Code being considered necessary by the learned Judge. The accused had pleaded guilty to the charges and prayed for mercy. The learned Judge in passing the sentence has observed that he had considered the circumstances under which the offences had been committed and also taken into consideration the age of the accused.

The Crown has not moved in this matter nor has the Crown appeared to back up the application for enhancement though the Rule was issued upon the District Magistrate.

Apart from the reasons which I have set out in full in my judgment in Revision case No. 800 of 1928† which have led me to hold that in a case like this it is not possible to enhance the sentence unless there has been a regular trial of the case in spite of the accused's plea of 'guilty', I think the Rule should be discharged on the simple ground that the Crown has not supported it. For the view I take I have given my reasons in full in Revision case No. 986 of 1928.

I would discharge the Rule.

Graham, J. :—In this case a Rule was issued to show cause

(1) (1929) 49 C. L. J. 432.

† Reported 49 C. L. J. 432.—Rep.

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why the sentence passed upon the accused Kasemali should not be enhanced.

The case for the prosecution was that on the 13th December 1927 at about 1 p.m. one Asmat Ali, uncle of the petitioner, was going to a place called Baliakhali to receive instructions in a Civil suit when he was waylaid and severely beaten by the above mentioned Kasemali and others, and Asmat Ali, who raised an alarm, received a spear wound in the chest from Kasemali which resulted in his death some 10 days later.

The accused was committed for trial to the Court of Sessions on charges under sections 304 (2), 326 and 148 Indian Penal Code and pleaded guilty. The learned Additional Sessions Judge accepting the plea convicted the accused under these three sections and sentenced him under section 304 (II) to one year R. I. and to 6 months R. I. under section 148 Indian Penal Code both sentences to run concurrently. No sentence was passed under section 326 Indian Penal Code. Thereafter the present Rule was obtained.

The question is whether the sentence is so manifestly inadequate that we ought to interfere. In my opinion there can be no doubt that the sentence which has been inflicted is altogether out of proportion to the offence committed. It seems to be clear that Asmat Ali was deliberately waylaid by a number of persons including the accused Kasemali the motive for the attack being Civil and Criminal litigation between the parties, Afsar Ali appears to have gone to the spot where Asmat Ali was laying and was thereupon speared through the chest by Kasemali. The medical evidence shows that it was a penetrating wound on the left side of the chest and was severe in character.

The learned Assistant Sessions Judge has referred to the circumstances under which the offence was committed and accused's age as his reasons for inflicting a lenient sentence. But neither of these reasons appears to me to carry much weight. The attack seems to have been a deliberate pre-arranged affair and as there was no evidence before the Judge it is difficult to know what circumstances he was referring to.

As regards the question of age it appears that the accused's age is given as 23 so that there can be no question of leniency on that account.

In my judgment the sentence passed is inadequate and I would make the Rule absolute and enhance it from 1 year to 3 years' rigorous imprisonment,

On account of this difference of opinion, the case was heard by Mr. Justice Buckland, who delivered the following judgment.

Buckland, J.—In this case a Rule has been issued at the instance of the complainant calling upon the accused to show cause why the sentence should not be enhanced.

The accused was convicted on his plea of guilty by the Assistant Sessions Judge of Bakarganj under sections 304 (II), 326 and 148 Indian Penal Code and sentenced to one year's rigorous imprisonment under section 304 (II) and six months' rigorous imprisonment under section 148, the sentences to run concurrently. The learned Judge stated that considering the circumstances under which the offence was committed and having regard to the accused's age he accepted the accused's plea and convicted him accordingly. The Rule was issued by this Court at the instance of the complainant on the ground that in considering the nature of the offence and the circumstances in which the occurrence took place the learned Sessions Judge ought to have passed a more severe sentence. Notices were issued to the person convicted as the law requires and to the District Magistrate of Bakarganj.

Upon the hearing of the Rule nobody has appeared for the Crown. This is a matter of some importance because it makes it clear that the Crown has not thought it necessary in the interest of public justice either to apply or, on the matter being brought to the notice of the Court at the instance of the complainant, to appear in support of the Rule. On behalf of the complainant it is stated that he is actuated solely by the desire to further the ends of justice and that nothing is further from his mind than to gratify his personal vindictiveness but this cannot be taken literally. That the gratification of personal spite should be discouraged is no doubt the reason why the Court has consistently refused to entertain applications of this nature at the instance of a private prosecutor. At the same time there is no absolute rule, and in a case where there is manifestly a ground for interference beyond all reasonable doubt, it matters not whether the case comes before the Court of its own motion or at the instance of a private prosecutor or through any other channel whatever and the Court will interfere. This aspect of the matter was considered by my learned brothers Mukerji and Graham JJ. in Criminal Revision case No. 986 of 1928 in which they differed and the case was thereupon laid before

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C. C. Ghose, J who appears to have taken the view that a Rule having been issued there was nothing to be done but to consider whether or not the sentence should be enhanced, which he did by restoring the sentence passed upon the person convicted by the trial Court and which had been reduced on appeal. I do not take the same view for the reason that a Rule is issued *ex parte* and matters have to be taken into consideration upon the hearing of the Rule which are not before the Court at the time when it is issued, for instance, contentions urged on behalf of the accused, the attitude of the Crown and other possible contingencies. In this case it has been urged before me by the learned Advocate for the accused that the circumstances of the occurrence were all taken into consideration by the learned Sessions Judge, that the deceased man was injured in the course of an affray, and consequently it cannot be affirmatively held that a more severe sentence should have been passed.

I have considerable doubt whether the sentence is adequate, and had the application been made at the instance of the Crown I should have been more inclined to enhance it. The learned Judge has not stated what circumstances he took into consideration and it would have been helpful if he stated what the circumstances were which led him to pass what appears at first sight to be a lenient sentence. But as I take a decided view that applications of this nature ought not to be encouraged at the instance of a complainant or private prosecutor, I am not disposed to give such an application any support unless it is clear beyond all question that it should be allowed. In my judgment this is not such a case, for in the circumstances I will give the accused the benefit of a very doubtful supposition that there were sufficient reasons present to the mind of the learned Sessions Judge for the sentence which he passed. The Rule will be discharged.

A. T. M.

Rule discharged.

Before Mr. Justice Pearson, and Mr. Justice Patterson:

GOBRA BADIA AND OTHERS

v.

KING-EMPEROR.*

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1929.

July 2.

Security—Suspected person—Criminal Procedure Code (Act V of 1898), Sec. 109—Attempt to conceal—Failing to give satisfactory evidence.

Section 109 (a) refers to the case of a continuous act and not the case of an isolated effort of concealment; *Rashu v. King-Emperor* (1) and *Sheikh Pirm v. King Emperor* (2).

The fact that the accused failed to give a satisfactory account of themselves cannot bring them within section 109 of the Code of Criminal Procedure; *Rashu v. King Emperor* (1).

Application for Revision under section 435 of the Code of Criminal Procedure by the Accused.

The material facts appear from the judgment.

Messrs. N. K. Basu and Tarapada Banerjee (for Mr. D. N. Bhattacharjee) for the Petitioners.

The judgment of the Court was as follows:

The accused were convicted and sentenced on certain proceedings under section 109 Criminal Procedure Code taken against them. The Sessions Judge sustained the conviction against the petitioners, and the present Rule has been issued on the ground that the provisions of section 109 would have no application to the facts as found in this case; that there was no concealment as contemplated by the section, because they gave true information to the police as to their names and addresses when questioned; and that it could not be said they had failed to give a satisfactory account of themselves, merely because they did not give a satisfactory account of what they were doing at the time of their arrest.

The finding of the Sessions Judge is that the accused "failed to give a satisfactory account of themselves and were attempting to conceal their presence within the jurisdiction of the Magistrate and that they were taking such precautions with a view to commit an offence."

It appears from the facts found that P.W. No. 7, then an acting Inspector of police, met the Sub-Inspector of police of Kaliganj, and informed the latter that he had heard there was likelihood of further dacoities in his neighbourhood. This witness also said that one Kalimuddin (P. W. 8) gave him information that he had been

*Criminal Revision No. 348 of 1929.

(1) (1917) 22 C. W. N. 163; 27 C. L. J. 382; (2) (1925) 41 C. L. J. 142.

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approached by one of the accused to join in a dacoity but had refused. Kalimuddin corroborated that. Then it appears that after that, on the 18th May, while enquiring into a dacoity case near by the Sub-Inspector of Kaliganj found the present accused all proceeding together towards a place called Aditmeari along the railway line. The Sub-Inspector therefore questioned them, and the evidence is that the accused or some of them, gave an account of where they were going, and for what reason, which was in some particulars at any rate demonstrated to be false, whereupon the story was changed. They were then all asked their names and what village they came from, to which it appears they replied with correct information. Three others of the accused gave a confused and shifting explanation of where they were going, and others gave replies of an extremely improbable and suspicious nature. One of the accused had a bottle of kerosine oil, a piece of bamboo and some rags, and the explanation regarding these was said to be shifty, and in certain respects demonstrated to be false by the evidence.

On the fact of the above it is difficult to maintain that the accused were attempting to conceal their presence within the meaning of section 109. They were residents within the jurisdiction and gave not false but true information as to their names and addresses. Then, although the District Magistrate points out that there are certain other considerations as to the contradictions in their statements, the decisions of this Court follow the principle that section 109 (a) refers to the case of a continuous act and not the case of an isolated effort at concealment. See *Rashu v. King Emperor* (1); *Sheikh Piru v. King Emperor* (2). The question of the accused's liability on this ground must be decided in their favour. As to the other ground, their having failed to give a satisfactory account of themselves, the facts found are undoubtedly more against the accused, but it is difficult to say that the facts are stronger than in the above case of *Rashu v. King Emperor* (1), where a man who was a Kabiraj and a dealer was found in association with two others at midnight and with house breaking implements in their possession: on being discovered he fled and when arrested remained silent and the explanation he subsequently gave to the Magistrate was false. It was held that he was not within section 109. On these grounds therefore the Rule is made absolute.

A. T. M.

Rule made absolute.

(1) (1917) 22 C.W. No. 163; 27 C. L. J. 385. (2) (1925) 41 C. L. J. 142.

PRIVY COUNCIL.

PRESENT : *Lord Shaw, Lord Carson and Sir Lancelot Sanderson.*

HIRA LAL SAHŪ AND OTHERS.

v.

RAJ KUMAR BABU LACHMI PRASAD NARAIN SINGH.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE

AT PATNA.]

Compound interest—Agreement to pay—Course of dealings between parties.

Compound interest, or interest with annual rests, may be allowed where the course of dealings between the parties extending over a large number of years shows an agreement by the debtor to pay the compound interest which was in fact charged by the creditor in the accounts periodically submitted to and acquiesced in by the debtor.

Appeal No. 151 of 1927 by the plaintiffs, from a judgment and decree dated the 22nd December, 1926, of the High Court, Patna (*Dass and Adami Jj.*), which affirmed a judgment and decree, dated the 6th March, 1923, of the Subordinate Judge of Motihari.

The material facts of the case appear sufficiently from their Lordships' judgment.

Dunn K. C. and Duke for the Appellants.

Their Lordships' judgment was delivered by

Sir Lancelot Sanderson:—This is an appeal by the plaintiffs against a judgment and decree, dated the 22nd of December 1926, of the High Court of Judicature at Patna, which affirmed a judgment and decree of the Subordinate Judge of Motihari, dated the 6th of March, 1923.

The plaintiffs are members of a joint family, and they carried on a money-lending business which was supervised by the first plaintiff who was Karta of the family.

The defendant began to borrow money from the plaintiffs on the 20th of Pous 1310 Fasli (i. e., January, 1903), when a sum of Rs. 300 was advanced and after the expiration of fifteen months eleven days interest was debited to the account. Further sums were advanced from time to time, and the accounts were adjusted periodically, the last adjustment having taken place on the 25th Jeth 1324, corresponding to May, 1917, so that the account between the parties was running for about fourteen years. Simple

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interest was charged upon each advance from the date of such advance until the date when the principal sum and interest were carried into a separate column of the account. The periods during which the interest was charged varied. The account was then adjusted and interest calculated on the total amount found due, so that compound interest was charged. During the time the accounts were running they were submitted to the defendant and on nine occasions he signed the accounts, the first occasion being 10th Magh 1312 and the last occasion being 25th Jeth 1324 Fasli.

The accounts submitted by the plaintiffs to the defendant and signed by him as above mentioned showed the compound interest, the dates at which the adjustments respectively were made, the periods during which and the rate at which the compound interest was charged.

There is no dispute in this appeal as to the advances which were made or as to the simple interest charged thereon.

The only question argued before the High Court of Patna and before this Board was whether the plaintiffs are entitled to recover the compound interest charged in the accounts. Both the Courts in India decided this question against the plaintiffs; and the decree which the plaintiffs obtained was confined to the advances made and simple interest at the rate of 12 per cent. per annum from the date of the advance of each item in the accounts up to the date of the institution of the suit; a further direction as to interest at the rate of 6 per cent. until realisation was made.

The learned Judges of the High Court held that the plaintiffs' case as to compound interest was not made out; they stated that compound interest had undoubtedly been charged in the accounts, but not according to the case of the plaintiffs.

The learned Judges referred to the plaintiffs' case as disclosed in the plaint, and drew attention to the allegation therein that it was the practice of the plaintiffs' firm to charge interest with annual rests; they then pointed out that annual rests had not been made in the accounts, which no doubt is the fact.

They held that in order to succeed the plaintiffs were bound to establish that the defendant agreed to pay the interest with annual rests, and finding that such agreement was not proved they disallowed the compound interest and dismissed the appeal.

Mr. Justice Dass, in his judgment, said as follows:—

"I quite agree that if the accounts which were signed by the defendant supported the case of the plaintiff I would have con-

siderable difficulty in accepting the defendant's case. But those accounts, in my opinion, do not support the specific case as made by the plaintiff."

The specific case there referred to is that there was an agreement that interest should be charged with annual rests, and the ground of decision is that as that specific case was not proved, the plaintiffs' claim to compound interest must fail.

With respect to the learned Judges, their Lordships are of opinion that too narrow a view of the plaintiffs' case was adopted.

The plaint set out the facts in detail with regard to the submission of the accounts by the plaintiffs to the defendant, the dates on which they were submitted and the amounts claimed to be due to the plaintiffs at the various times when the accounts were presented; it was therein alleged that the defendant affixed his signature to the accounts when they were submitted to him, and reference was made to the last account which the defendant signed on the 25th Jeth 1324 Fasli and which showed an amount due of Rs. 1,02,706-6-3. The accounts thus referred to included the items of compound interest claimed by the plaintiffs.

It is true that it was alleged in paragraph 16 of the plaint that the plaintiffs' practice was to charge interest with annual rests, but there is also a specific allegation that the defendant was informed of the claim to interest and compound interest and he accepted the claim.

In view of these allegations in the plaint their Lordships are of opinion that the plaintiffs are entitled to rely on the course of dealing between the parties as showing an agreement by the defendant to pay the compound interest which was in fact charged by the plaintiffs in the accounts submitted to him.

Their Lordships have no doubt that in fact the defendant did so agree.

The course of dealing continued for about fourteen years: the accounts were periodically submitted to the defendant; when submitted he signed them, the accounts undoubtedly showed in detail the advances made, the interest charged, and the periods at which the rests were made, and no objection was made at any time during the abovementioned period. There was no doubt good consideration for the above-mentioned agreement, because, as the learned Subordinate Judge pointed out, if the defendant had objected to the compound interest being charged he would not

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have been able to obtain the further advances from the plaintiffs, which he desired, and which in fact he did obtain.

Their Lordships therefore are of opinion that the pleadings alleged an agreement by the defendant to pay the compound interest charged in the accounts which were submitted to and accepted by him, and that such agreement was proved.

The amount acknowledged by the defendant to be due in the account signed by him and dated the 25th Jeth 1324 Fasli was Rs. 1,02,706-6-3. The transactions between the parties then ceased. Three items of compound interest for three periods after the 25th Jeth 1324 were included in the plaint making a total of Rs. 1,43,865-15-3. No agreement by the defendant to pay these items has been proved.

Their Lordships therefore are of opinion that there should be a decree in favour of the plaintiffs for the said sum of Rs. 1,02,706-6-3 with interest thereon at the rate of 12 per cent. per annum from the 26th Jeth 1324 Fasli corresponding to 2nd June 1917 until the date of the institution of the suit: and that the total amount of the said sum and the said interest should carry interest at the rate of six per cent. per annum from the 6th March 1923 (the date of the Subordinate Judge's decree) until the date of realisation.

The appeal therefore should be allowed, the decrees of the learned Subordinate Judge and of the High Court at Patna should be set aside, and a decree should be made in favour of the plaintiffs in the abovementioned terms. The defendant should pay the plaintiffs the costs of this appeal and of the proceedings in both Courts in India, and their Lordships will humbly advise His Majesty accordingly.

H. S. L. Polak : Solicitors for the Appellants.

Watkins & Hunter : Solicitors for the Respondent.

K. J. R.

Appeal allowed.

PRESENT: *Lord Carson, Lord Salvesen and Sir George
Lodges.*

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v.

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April, 15.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT PATNA.]

*Muhammadian Law—Dower debt—Charge upon property—Decree in dower suit
creating a charge.*

A Muhammadan widow claiming dower *simpliciter* from her deceased husband's estate is in no better position than any ordinary unsecured creditor, and therefore (in the absence of a specific charge upon the property of the deceased), a *bona fide* purchaser for value from the heir of the deceased husband gets an unassailable title to the property.

Held, on the proper construction of the decree passed in the suit instituted by the widow for recovery of her dower, that the effect of the decree was to create a charge in favour of the plaintiff in respect of her dower debt upon the properties of her husband, and accordingly, the respondents, having bought with notice of such decree, their purchase was subject to the charge.

Appeal No. 45 of 1927 by the plaintiffs, from a decree of the High Court, Patna, (*Ross and Kulkarni Sahay JJ.*), dated the 19th March, 1926, reversing an order of the Subordinate Judge of Patna, dated the 23rd June, 1925.

The material facts of the case appear sufficiently from their Lordships' judgment. The case in the High Court is reported in 95 Indian Cases 367.

The main question for determination on the appeal to the Privy Council was whether the terms of a decree made in a suit instituted by the widow to recover her dower debt operated to create a charge on the properties in dispute. The Subordinate Judge decided the question in favour of the appellant, but the High Court took the opposite view.

The dower suit was contested, and the third issue therein was the following :—

"(3) Whether the dower debt, if any, can be realized from the properties mentioned in the plaint?"

After hearing the evidence produced by the parties the Subordinate Judge (in the said suit for dower) delivered judgment on the 31st January 1918. He described the nature of the suit in the following words :—

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"The plaintiff has brought this suit for the recovery of Rs. 40,000 and Rs. 15 as the price of one gold mohur as her dower with declaration that the properties described in Schedules 1 and 2 of the plaint are charged for the payment of the said amount."

The learned Subordinate Judge found the above issue in favour of the widow, saying: "I also find that the dower debt of the plaintiff is recoverable from the properties mentioned in Schedules 1 and 2 of the plaint."

The learned Subordinate Judge therefore made a decree, allowing the widow's claim, in the following words:—

"It is ordered and decreed that this suit be decreed with costs and interest at the rate of 6 per cent. per annum from this date up to the date of realization, that Rs. 40,000 (forty thousand) and one gold mohur worth Rs. 15 be declared the dower debt of the plaintiff, that the properties entered in Schedules 1 and 2 to the plaint be treated to be the properties of Khaja Azhar Husain from which the plaintiff is entitled (to recover) the decretal money, that defendants Nos. 2, 3 and 4 do pay to the plaintiff the costs of this suit with interest thereon at the rate of 6 per cent. per annum up to the date of realization, and that Rs. 40,015 on account of the money claimed and Rs. 2099-4-0 on account of the costs of the suit with interest at the rate of 6 per cent. per annum from this date up to the date of realization be paid by defendants Nos. 2 to 4 (sic) to the plaintiff".

(*Note*: The properties now in question were included in Schedules Nos. 1 and 2 mentioned above, and the present appellants contended that these properties were liable to discharge the amount due under the above decree).

Dubs for the Appellants.

Dunne K. C. and *Majid* for the Respondents.

Their Lordships' judgment was delivered by

April, 15.

Sir George Lowndes:—The appellants are the representatives of Izatunnissa Begam, the widow of one Azhar Husain, a Shia Mohammedan, who died in 1916. His sole heir according to the Shia law was his sister Ahmadi Begam. Izatunnissa Begam was entitled on her husband's death to a dower of Rs. 40,000 and one gold mohar of the value of Rs. 15. Azhar Husain in his life time had executed certain deeds by which he purported in effect to denude himself of his immovable properties which were of considerable value. Shortly after his death Izatunnissa Begam took proceedings in the Subordinate Judge's Court at Patna to enforce her dower claim. She impleaded in her suit as the principal defendants, Ahmadi Begam and the other persons interested in Azhar Husain's

alienations and as *pro forma* defendants certain other creditors of the deceased. She claimed by her plaint that these alienations were invalid, and that she was entitled to recover her dower debt from the properties. She prayed for a decree for the Rs. 40,015; for a declaration that the properties specified in the schedules to the plaint were "the heritage" of Azhar Husain, and that "the plaintiff be empowered to recover her decree from them." A specific issue was raised at the hearing "whether the dower debt . . . can be realised from the properties mentioned in the plaint." The Subordinate Judge on the 31st January, 1918, decided in Izatunnissa's favour and by his decree it was ordered "and decreed that this suit be decreed with costs and interest at the rate of 6 per cent. per annum from this date up to the date of realization, that Rs. 40,000 (forty thousand) and one gold mohar worth Rs. 15 be declared the dower debt of the plaintiff, that the properties entered in schedules Nos. 1 and 2 to the plaint be treated to be the properties of Khaja Azhar Husain from which the plaintiff is entitled (to recover) the decretal money."

There was no appeal from this decree which is therefore binding between the parties, and the only question now is whether on a proper construction of the decree the dower debt was charged upon the properties.

In July, 1923, while the greater part of this debt was still unsatisfied, Ahmadi Begam as the heir of Azhar Husain sold two of the scheduled properties to the first and second respondents who alone are contesting this appeal. It is admitted that they had full knowledge of the decree in the dower suit, and in fact they claim that the decree was mortgaged to them by Izatunnissa. If therefore the decree created a charge upon the properties, it is clear that (apart from any question of the mortgage) they bought the properties subject to the charge.

Izatunnissa died in September, 1923, leaving as her heirs the first, second and third appellants, who assigned a share in the decree to the other appellants. On the 26th January, 1924, the appellants applied for execution of the decree by sale of the properties, including those sold to respondents 1. and 2. which were attached at the instance of the appellants. The contesting respondents applied to set aside the attachment. The Subordinate Judge held that the decree created a charge upon the properties and that therefore the respondents' claim was not maintainable. If this view is correct it was probably unnecessary to attach the properties in realisation of the decree. Proceedings were taken in review of

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this order, and the case was remitted by the High Court for further investigation. The Subordinate Judge then allowed an amendment of the application for execution bringing the first and second respondents on the record as representatives of the judgment debtors and making it clear that execution was sought by way of enforcement of the charge. Allegations were made by the respondents that Isatunnissa had been a party to certain mortgages executed by Ahmadi Begam in their favour and had also mortgaged her decree to them. These allegations were denied by the appellants. The documents are not on the record of this appeal, nor is there any material from which it would be possible for their Lordships to come to any safe conclusion on this part of the case.

In the event the Subordinate Judge affirmed his previous decision that the decree created a charge upon the properties and finally rejected the respondents' claim.

On appeal to the High Court the learned Judges say that the principal point argued before them on behalf of the present respondents was that the decree in the dower suit did not create a charge upon the properties, and upon consideration of the pleadings in the suit and the wording of the decree, they came to the conclusion that no charge was created. They thought that the only object of the suit was to free the properties from the alleged alienations of Azhar Husain and to make them available to satisfy the widow's claim for dower on the same footing as the other debts of the estate. It has not been disputed before their Lordships that a widow claiming dower from her deceased husband's estate is in no better position than any ordinary creditor, and that, apart from the decree, a *bona fide* purchaser for value from the heir would get an unassailable title. Their Lordships however are unable to agree with the interpretation put by the Judges of the High Court upon the decree. It is in their Lordships' opinion clear that the plaintiff in the suit was not seeking merely to be put in a position to execute a money decree against the estate, but was asking the Court by its decree to imprint upon the properties a specific liability to satisfy the dower debt, or in other words to charge the properties with the payment of this particular debt. They are therefore in agreement with the Subordinate Judge that the decree created a charge upon the properties and that the respondents 1 and 2 having bought with notice of the decree, their purchase was subject to the charge. Whether the charge was rightly decreed or not in the first instance is immaterial, though their Lordships see no reason to doubt that it was within

the competence of the Court to make such a declaration. But the decree was not appealed against, and is clearly binding on the parties and those claiming under them.

A question was raised in the High Court as to the propriety of the amendment which brought respondents 1 and 2 upon the record, but the Judges thought it unnecessary to determine this question, and no reliance has been placed upon this contention before their Lordships.

It only remains to consider what the effective result of the appeal should be. Their Lordships are not for the reason already stated in a position to deal with the claim of respondents 1 and 2 to be themselves mortgagees of the dower decrees. All they can do is to declare that the decree created a charge upon the scheduled properties including those purchased by respondents 1 and 2 for the balance due under it for the dower debt. This charge will in any case have to be worked out by the executing Court, and when this question is taken up it will be open to the respondents 1 and 2, if so advised, to set up their claim as mortgagees from Izatunnissa Begum.

Inasmuch as the only competent question throughout the proceedings has been that of construction of the decree, upon which the appellants have succeeded, their Lordships think that the costs both here and below should be borne by the contesting respondents, and they will humbly advise His Majesty that the decree of the High Court should be set aside and the appeal allowed upon the terms of this judgment.

H. S. L. Polak : Solicitors for the Appellants.

Francis & Harber : Solicitors for the Respondents.

K. J. K.

Appeal allowed.

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PRESENT : *Lord Carson, Lord Salvesen and Sir George Lowndes.*

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MA MYA AND ANOTHER

v.

MA ME KYIN AND ANOTHER.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT RANGOON.]

Burmese Buddhist Law—Inheritance—Devolution of property of owner leaving widow and son.

Under the Burmese Buddhist law, when the owner dies leaving him surviving a widow and a son, the whole of his property, immovable and moveable, devolves upon his widow to the exclusion of his son who takes no share in it during his mother's life time.

Appeal No. 59 of 1928 by the Defendants, from a decree of the High Court, Rangoon, (*Chari and Heald JJ.*), dated the 30th June, 1926, modifying a decree of the District Court of Myaungmya.

De Gruyter K. C. and *Pennell* for the Appellants.

The Respondents were not represented at the hearing.

Their Lordships' judgment was delivered by

April, 23.

Sir George Lowndes :—One U Tun, a Burman, residing at Thayetkon in the District of Myaungmya, died a number of years ago leaving him surviving his widow Daw Hmo and one son Lu Pe. Their Lordships were told that under the Buddhist law by which the parties are governed, the whole of U Tun's property, which consisted of a house, some paddy land, and jewellery, and apparently a substantial sum in cash, devolved upon his widow, his son Lu Pe taking no share in it during his mother's life time. U Tun and his wife had brought up a nephew of Daw Hmo's, by name Hmat, whose parents had died in his infancy, and it is admitted that he was always on terms of great affection with both Daw Hmo and Lu Pe, and was treated during the whole of his life as a member of their family. Lu Pe was some years older than Hmat and it appears that after U Tun's death Lu Pe carried on the family money lending business and acquired paddy lands and other immovable properties, the deeds of most of which were taken in his name. He had so far as the record discloses no independent means of his own, and it seems probable that the source of his acquisitions was in reality what had devolved upon his mother

on U Tun's death. When Hmat attained years of discretion he was initiated into the family business and eventually came to take a considerable part in it. Between the years 1917 and 1922 five purchases of paddy land and one of a house and bullocks were made in the joint names of Lu Pe and Hmat and, during various periods, beginning apparently in 1911, his name appeared as one of the lenders on promissory notes taken in the ordinary course of the money lending business. Hmat died in May, 1923, leaving him surviving a widow Me Kyin and a minor son by a previous wife, who are the respondents in this appeal. Lu Pe died a month or two later leaving a widow Ma Mya and a minor daughter, who are the present appellants.

The harmony which had prevailed for so many years in the family seems to have been disturbed very soon after the death of Lu Pe. First there were disputes between Lu Pe's widow Ma Mya and her mother-in-law Daw Hmo, which were eventually settled by an agreement, the terms of which are not material to this appeal. Then Hmat's widow, Me Kyin, set up a claim that her husband had been adopted by Daw Hmo and her husband, and filed a suit to have this established. It is sufficient to say however that this suit was dismissed, and the only possibly material fact connected with it is that Daw Hmo gave evidence in the suit and denied that any part of the family property, which at Lu Pe's death was considerable, belonged to her. On the failure of the adoption suit Me Kyin instituted the suit out of which this appeal arises in the Court of the District Judge of Myaungmya. By her plaint she claimed that the whole of the family property was the joint acquisition of Daw Hmo, Lu Pe and Hmat, but, inasmuch as Daw Hmo had disclaimed all interest in it, that she and the minor plaintiff were entitled to one half of the estate. Daw Hmo and Lu Pe's widow put in a joint written statement of defence, denying the claim, and asserting that Lu Pe was the sole owner subject to the rights of Daw Hmo "who being the mother has right and interest over [the property] according to the Buddhist law." Ma Mya contested the suit, but Daw Hmo seems to have taken no further part in the litigation, and owing to her age and infirmities she was not examined as a witness. The main issue in the case was formulated by the District Judge after hearing the parties, in a wide form:—"Whether Maung Hmat at the time of his death had any interest in the suit properties, and if so to what extent?"

The materials upon which the District Judge was called to,

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determine this issue were voluminous but indecisive. A mass of purchase deeds, leases, and mortgages were recorded, of which the purchase deeds in respect of the six properties above referred to were in the joint names of Lu Pe and Hmat, all the rest (a great majority) being apparently in the name of Lu Pe alone. As to the six deeds Ma Mya, Lu Pe's widow, who was the principal witness for the defence, said that in her view Lu Pe wanted to give Hmat some interest in these properties for his services, but that as Hmat was "fond of pleasure" Lu Pe did not keep the property entirely in his name. The Subordinate Judge accepted this view, calling in aid of his decision the provisions of Sec. 45 of the Transfer of Property Act, 1882. He accordingly held that Hmat's widow and child were entitled to a half share of these six properties. He also included with one of the properties a thousand baskets of paddy, apparently as representing a year's produce of the land. Apart from these properties he disallowed the plaintiff's claim. He thought that the case of joint acquisition in respect of the other properties, including the outstanding assets of the money lending business, had not been established.

In the High Court at Rangoon to which the plaintiffs appealed, the contest turned mostly on so much of these assets as consisted of promissory notes on which Hmat's name appeared as one of the lenders. During at all events specific periods between 1909 and 1923 counter-foil books of promissory notes were used in the business in which the name of Hmat was printed as one of the lenders. Lu Pe's name always appeared jointly in these books with Hmat's, and at different times the names of Lu Pe's wife and daughters also appeared on them. After Hmat's death his name continued to be used for some little time as a lender, probably in the case of renewals of previous loans to which he had been a party, as in one case it was struck out, and similarly after Lu Pe's death his name continued to be used. Eventually new promissory notes were substituted in the names of Daw Hmo and Ma Mya. With reference to the appearance of Hmat's name on the promissory notes, Ma Mya said that it was merely inserted to give him "status," but she asserted that the money was all Lu Pe's. No other explanation was suggested; no account books were produced showing how each particular transaction was debited or credited, and their Lordships were told that books are not ordinarily kept in this class of business in Burma. There were, however, a number of memoranda in Hmat's handwriting showing settlements of account. These were

exhibited in the Trial Court but have not been printed in the record. Their Lordships cannot help thinking that they might have thrown some light upon the transactions. The witnesses who were called spoke of the loans being made by both Lu Pe and Hmat, and said that one never acted without the other. There was no proof that Hmat was paid for his services. He merely lived with the family in a separate house provided by the family, and was supported by it.

On this state of facts the Judges of the High Court came to the conclusion that the only explanation of the promissory notes being taken in this form was that Hmat was intended to have a definite interest in them. In all the outstanding notes on which Hmat's name appeared, that of Ma Mya also appeared along with the name of Lu Pe, and the learned Judges held that the reasonable inference was that each of them was interested to the extent of one-third. With regard to the paddy lands held under the joint title, they did not disturb the finding of the District Judge, the defendants' cross-objections on this point having been held to be out of time. The defendants have now appealed to His Majesty in Council, and their Lordships are invited to hold upon these facts that the plaintiffs had no interest in the property and that the suit should have been dismissed. It is unfortunate that the plaintiffs (respondents) are not represented before their Lordships. It is also unfortunate that the appellants in their desire to reduce the bulk of the record have printed practically none of the large number of material documents which were before the Courts in Burma. None of the sale deeds are printed, whether in the joint names of Lu Pe and Hmat or of Lu Pe alone: none of the memoranda of accounts: none of the counterfoil books or counterfoils of the promissory notes are reproduced; a power of attorney which is said to have been given by Lu Pe to Hmat in 1918, and which might be an important document is also omitted. All this material is represented merely by an index which indeed briefly describes the nature of the documents, but is of no real assistance.

The arguments addressed to their Lordships were naturally based on the absence of proof of the possession by Hmat of any independent means by which he could have joined in the purchase of immovable property or have made loans to customers. All the monetary resources are said to have been Lu Pe's. How what was apparently Daw Hmo's property at her husband's death passed to Lu Pe has not been explained. In fact Mr. Pennell the junior counsel for the appellants asked their Lordships to hold

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that the whole property was really Daw Hmo's, Lu Pe having only acted as her agent and manager. If there was no partition between the mother and son, he asserted that the whole of the acquisitions would be the property of the mother. Mr. De Gruyther took the opposite view, that everything was Lu Pe's, and indeed seeing that the appellants were Lu Pe's widow and daughter and that Daw Hmo though a party to the litigation apparently made no claim to the property, it was almost essential to the appellants' case to assert Lu Pe's ownership. One striking fact that seems to negative the assertion by the plaintiffs of joint acquisition in respect of the whole property is that when money was borrowed for the business it was taken in the names of Lu Pe and his wife, Hmat being no party to any such transaction. Several chetties from whom Lu Pe had been in the habit of borrowing were called for the defence, and it was clearly established that Hmat was never a party responsible for any loan by them. The High Court however point out that there is no proof that any of the joint transactions, whether by way of purchase of paddy lands or loans on promissory notes, were founded on these advances, and it may well be that the monies borrowed from the chetties would be employed in the independent dealings of Lu Pe which were admittedly of considerable extent.

Their Lordships also feel that much weight must be attached to the position of Hmat in the family. He was evidently treated by Daw Hmo as a foster son, and by Lu Pe as a foster brother. He was educated, married and maintained at the family expense and took a prominent part in the family business and acquisitions; and under these circumstances, especially if the foundation of the family fortunes was really the sole property of Daw Hmo, it appears not unnatural to their Lordships that when specific pieces of property are found to be in the joint names of the two, or, in the case of particular advances, the names of both appear as lenders, the intention should have been to express a joint interest and a joint right. It is objected that this necessarily implies a gift by Lu Pe to Hmat, and that no gift is either alleged or proved. Their Lordships think that this, though perhaps technically correct if they were satisfied that the nucleus was the independent property of Lu Pe, is hardly convincing having regard to the known facts. They think it not improbable that by mutual understanding a portion of the family acquisitions was without any particular formality treated as joint and so entered in the only documents in existence by which any title could be shown. Their Lordships have

little doubt that this was the definite intention in the case of the particular paddy lands and other immovable property purchased in the names of the two, and though the question of the promissory notes is more involved, their Lordships are not satisfied that the finding of the High Court, based as it was on documents which have not been made available to the Board, is wrong.

Under the circumstances therefore their Lordships find themselves unable to dissent from the main conclusions of the High Court. Objection however has been taken, and their Lordships think rightly, to the way in which the learned Judges have dealt in their decree with the assumed proceeds of the promissory notes in which they held Mo Kyin and her stepson to be interested. Their Lordships think that the right method of working out the decree in such a case is by the appointment in India of a Receiver to realise the monies due on the notes and to pay over to the respondents the third share of the recoveries to which they have been held entitled.

Their Lordships will accordingly humbly advise His Majesty that the decree of the High Court should be varied to this extent but should otherwise be affirmed.

J. E. Lambert : Solicitor for the Appellants.

K. J. R.

Appeal dismissed : Decree varied.

PRESENT : *Lord Shaw, Lord Carson and Sir Lancelot Sanderson.*

RAMJI PATEL

v.

RAO KISHORESINGH

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF THE CENTRAL PROVINCES.]

Second appeal—Civil Procedure Code (Act V of 1908) Secs 100, 101—Erroneous finding of fact by the first appellate Court—Interference in second appeal when justifiable—Specific Relief Act, (I of 1877) Secs. 12, 21—"Explanation" to section 12—Compensation in money, when an adequate relief for breach of contract to transfer immovable property—Refusal to pass decree for specific performance—Presumption created by S. 12, "Explanation".

Having regard to the provisions of the Civil Procedure Code, 1908, sections 100 and 101, there is no jurisdiction to entertain a second appeal on the

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ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding: *Mussumat Durga Choudhrai v. Jawahir Singh Choudhri* (1) followed.

Where therefore, the first appellate Court comes to a clear finding of fact, and there was evidence on which it could properly arrive at such finding, it is not open to the High Court in second appeal to interfere with the finding of fact thus arrived at.

In a suit for specific performance of a contract to transfer immoveable property, where the Court finds that compensation in money is an adequate relief to the plaintiff for the non-performance of the contract by the defendant, a decree for specific performance cannot be passed in the plaintiff's favour, [vide the express provisions of the Specific Relief Act, 1877, sections 12 (c) and 21 (a)].

The presumption created by the "Explanation" to section 12 of the Specific Relief Act, 1877, (namely, that "unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money"), is a rebuttable one, and is rebutted on proof that the breach of the contract could be adequately relieved by compensation in money.

Appeal No. 82 of 1927 by the Plaintiff, from a judgment and decree of the Court of the Judicial Commissioner, Central Provinces (*Messrs. Findlay and Pridoux*), dated the 22nd August, 1925, which reversed a judgment and decree of the District Judge of Nimar, dated the 8th May, 1924, and restored a judgment and decree of the Court of the Subordinate Judge of Khandwa, dated the 20th November, 1923.

The material facts of the case appear sufficiently from their Lordships' judgment.

The main questions for determination on the appeal to His Majesty in Council were:—(1) Whether in second appeal the learned Judicial Commissioners had power to reverse findings of fact of the lower appellate Court (Court of the District Judge); and (2) Whether the appellant was entitled to specifically enforce against the respondent an agreement dated the 11th November, 1912 for sale of a village called Khedi.

Dumns K. C. and *Parikh* for the Appellant.

Kyffia for the Respondent.

Dumns K. C. : Section 100 of the Civil Procedure Code, restricts the grounds upon which the second appellate Court could disturb the judgment of the first appellate Court; see section (1) (1890) L. R. 17 I. A. 122; I. L. R. 18, Calc. 23.

101, and *Mussumat Durga Choudhrai v. Jawahir Singh Chowdhri* (1).

The finding of the District Judge that the agreement was not a hard and unconscionable bargain, was binding upon the learned Judicial Commissioners.

As to cases when specific performance of a contract should be enforced, see the Specific Relief Act, 1877, Chapter II, section 12, *et seq.* Under the "Explanation" to section 12 of the Act, there is a presumption that in case of a contract to transfer immoveable property, mere compensation in money would not afford an adequate relief to the party aggrieved, and the Court should not ordinarily refuse specific performance. There is a *prima facie* presumption created by the "Explanation."

(*Sir Lancelot Sanderson* : There is no suggestion that there was no evidence to justify the District Judge's finding that damages were an adequate relief to the plaintiff.)

(*Sir Lancelot Sanderson* refers to section 21 of the Specific Relief Act.)

A presumption can only be rebutted by proof. There is not a particle of evidence here in support of the finding of the District Judge. The Act expressly provides that it must be proved that compensation would be an adequate relief in case of a contract to sell immoveable property. Refers to illustrations to clause (c) of section 12.

(*Sir Lancelot Sanderson* : What sort of proof do you expect ?)

The "Explanation" positively requires that there must be some kind of proof.

Parikh follows, and refers to section 19 of the Act.

Kyffin for the Respondent :—In view of the District Judge's finding that compensation in money was an adequate relief, specific performance was rightly refused. The Court had no power to make a decree for specific performance, even in the alternative.

The finding of the District Judge that the bargain was not a harsh and extortionate one, is bad in law.

Their Lordships' judgment was delivered by

Sir Lancelot Sanderson : This is an appeal by the plaintiff in the suit from a decree of the Court of the Judicial Commissioner, Central Provinces, setting aside a decree of the District Judge, Nimar. The date of the first-mentioned decree was 22nd August, 1925, and the date of the second-mentioned, namely, that of the District Judge, was the 8th May, 1924.

(1) (1890) L. R. 17 I. A. 125 ; I. L. R. 18 Calc. 23.

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In 1908 the defendant-respondent had instituted a suit against two widows to recover possession of an estate known as the Bhamgarh Zemindary, and after having obtained a decree in his favour, that decree was reversed by the Court of the Judicial Commissioner. He desired to prosecute an appeal to His Majesty in Council and to enable him to do so he had to raise money. He entered into an agreement with the plaintiff on the 11th November, 1912, with regard to the advance of the sum of Rs. 5,000 by the plaintiff on the terms therein mentioned. The agreement was as follows :—

"I have brought from you Rs. 5,000 in words five thousand cash in order to file my appeal to the Privy Council, and at this time I am very badly in need of this amount, because if you do not pay me the amount now, it will be extremely difficult for me to file the appeal. Therefore I lay down in writing and bind myself by this agreement that when I may win my case in the Privy Council in England and a decree may be passed in my favour, I shall at once sell, in lieu of this amount, the full sixteen anna proprietary rights of mauza Khedi out of my villages, Settlement No. 387, tahsil Harsud district Nimar, area 3,630.87, Government demand Rs. 125, with all rights, under a duly registered sale-deed and put you in possession of the mauza. If I fail to do so, you may take possession of the mauza and get a sale-deed duly executed through a Civil Court. If unfortunately the decree be not passed in my favour and the case decided against me, I shall pay interest at eight annas per cent. per mensem on this amount from the date of the decision of appeal, and execute a separate bond for the same agreeing to pay the amount by instalments. I shall not raise any objection. And on winning the case, I shall execute a sale-deed of mauza Khedi, tahsil Harsud, in lieu of this amount, without fail. Therefore I have executed this deed of agreement with my free will and pleasure on receiving the amount in cash. It is true. It may remain as a record and be of use when necessary."

Shortly stated, the facts are that he won his case before the Judicial Committee of the Privy Council, which allowed his appeal; and that he refused to carry out the agreement above quoted, hence the present suit.

The remedy sought by the plaintiff was for a decree as follows :—

"(a) Ordering the defendant to execute properly a registered sale-deed conveying validly to the plaintiff his entire interest, con-

5 sisting of 16 annas, in mauza Khedi as described in list A herewith attached, with all rights appurtenant thereto and to deliver possession of the same to the plaintiff.

"(b) It is also prayed in the alternative that if the Court does not think fit to grant the above relief to this plaintiff for any reason; the Court be pleased to order the defendant to refund the sum of Rs. 5,000, with interest at 2 per cent per month on it, from the date of agreement till realization, plus such amount by way of compensation to the plaintiff for the loss of the immoveable property which he will thus suffer.

"(c) The plaintiff prays for his costs of the suit and such other relief as the Court thinks fit."

The defendant pleaded that the plaintiff was not entitled to a decree for specific performance for the following reasons:—

"(1) That the village Khedi yields a profit of nearly Rs. 1100 a year, and is now, and was at the time of the agreement worth not less than Rs. 20,000.

"(2) The distress and distracted state of mind which the defendant was in at the time of the agreement gave the plaintiff an unfair advantage to secure the village for one-fourth of its value. The discretion to decree specific performance should not be exercised in plaintiff's favour under Section 22, Specific Relief Act.

"(3) That there has been undue delay in bringing the suit,

"(4) That the plaintiff himself, after the decision of the Privy Council appeal, agreed to take the money with interest instead of the village, and thereby induced the defendant to deposit part of the money with Gopal Rao and his son, for payment to plaintiff, and to agree to the plaintiff's retaining Rs. 1,161 as stated above. The plaintiff is estopped from claiming specific performance."

The suit on remand was tried by the learned Subordinate Judge of Khandwa, who declined to make a decree for specific performance. He held that the village of Khedi was worth at least Rs. 20,000, that the agreement entered into was highly speculative, that it was unfair and extortionate, and he made a decree in favour of the plaintiff for Rs. 10,000, with interest at the rate of 6 per cent, per annum as stated in the decree. The plaintiff appealed to the learned District Judge, who held that the defendant was in serious money difficulties and was distressed in mind at the time the agreement of the 11th November, 1913, was made, but that he was not overwhelmed by distress, that the

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value of the village Khedi at the date of the said agreement had not been proved to be more than was admitted by the plaintiff, viz., Rs. 9,000, that the bargain was not extortionate, that the trial Court was wrong in holding that the defendant had been imposed upon by the plaintiff and his supposed confederates, and that the trial Court was wrong in refusing specific performance.

Accordingly the learned District Judge made a decree for specific performance, and he directed that the defendant should execute a sale-deed conveying the village Khedi to the plaintiff.

It is necessary to refer to two other findings of the learned District Judge, viz.: (1) that damages would have been an adequate relief to the plaintiff and (2) that such damages should be Rs. 20,000.

In dealing with this question the learned Judge referred to the ninth ground of the appeal in his Court, which was as follows:—

“That it should have been held that under the circumstances of the case damages was not an adequate relief to the plaintiff, and that at any rate the damages awarded by the Lower Court are grossly inadequate.”

The learned District Judge in this respect said as follows:—

“No special damages have been proved by the plaintiff. He simply invested money, and a return of money should normally be sufficient. It is not shown that he had any pressing need for land. On the contrary, from the very nature of the contract it is evident that there was no hurry at all, and that not only might plaintiff fail to get the land, but in any case he could not expect to get it for several years. Indeed, the only reason for insisting upon specific performance is that the value of the village now is probably more than the money advanced *plus* reasonable interest. Plaintiff can certainly say that he took a risk and that he should be compensated for such risk. But compensation could be given in money. This ground of appeal must fail.”

In their Lordships' opinion, the learned District Judge came to a clear finding that compensation in money was an adequate relief to the plaintiff, and having regard to the provisions contained in the material sections of the Specific Relief Act (Act I of 1877), to which reference will presently be made, it is difficult to understand how the learned Judge came to make a decree for

specific performance of the contract in view of the above-mentioned finding.

On the hearing of the appeal before this Board it was admitted by the learned counsel for the plaintiff that he was bound by the above-mentioned finding unless he could show that there was no evidence in support thereof, and he argued that there was no such evidence.

It will be convenient to dispose of this question at once.

Their Lordships are of opinion that there was evidence; the nature of the transaction, the terms of the agreement itself, and the other matters mentioned by the learned District Judge in the passage of his judgment, already cited, are sufficient to show that there was evidence on which the learned District Judge could properly arrive at the above-mentioned finding. In their Lordships' opinion, therefore, it must be taken for the purposes of this appeal that compensation in money was an adequate relief to the plaintiff for the non-performance of the contract by the defendant, and that the amount of such compensation should be Rs. 20,000.

The defendant appealed to the Court of the Judicial Commissioner, and the appeal was heard by the Judicial Commissioner and the Additional Judicial Commissioner.

The learned Judicial Commissioners on the hearing of the appeal entered into the consideration of questions which were not open to them having regard to the provisions of Sections 100 and 101 of the Civil Procedure Code (Act V of 1908).

The sections are as follows :—

"100—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely :—

(a) the decision being contrary to law or to some usage having the force of law ;

(b) the decision having failed to determine some material issue of law or usage having the force of law ;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits ;

"(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

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" 101. No second appeal shall lie except on the grounds mentioned in Section 100."

With reference to these sections their Lordships find it necessary once more to refer to the well-known passage in the judgment of Lord Macnaghten in *Mussumat Durga Choudhrai v. Jawahir Singh Choudhri*, (1) at page 127, which dealt with the material sections relating to second appeals in the Code of Civil Procedure, 1882. The passage is as follows:—

"It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the First Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding."

The provisions of the above-mentioned sections of the Code of 1908 and the above-mentioned ruling, which is applicable to the present Code, were disregarded in the present case.

As, for instance, the first appellate Court held that the value of the property at the time of the agreement in 1912 was not more than was admitted by the plaintiff, viz., Rs. 9,000. The Judicial Commissioners did not accept this finding of fact, but they held on the evidence that in 1912 the value of the village was not far below Rs. 20,000.

Again, the first appellate Court held that the bargain was not extortionate, that it was not even harsh, but that it was fair.

The Judicial Commissioners held that it was a hard and unconscionable bargain, of which specific performance should be refused.

It was not open to the Court of the Judicial Commissioner to interfere with either of the above-mentioned findings of fact of the first appellate Court, inasmuch as there was ample evidence in support of the findings of the first appellate Court which was proper for its consideration.

For these reasons alone the judgment of the Court of the Judicial Commissioner cannot be supported.

There is, however, a further difficulty in the way of supporting the judgment of the Court of the Judicial Commissioner. The Judicial Commissioners agreed with the first appellate

(1) (1890) L. R. 17 I. A. 122 (127).

7 Court in the finding that compensation in money was an adequate relief to the plaintiff, and they further held that the value of the village was not far below Rs. 20,000 in 1912, the date of the agreement.

Yet the decree of the Court of the Judicial Commissioner was not for Rs. 20,000, as would have been expected, but a sum of Rs. 11,555-13-4 only was awarded.

Their Lordships understand that this sum was arrived at on the basis that the agreement was a hard and unconscionable bargain, and that the plaintiff was entitled to no more than a return of the money advanced by him, together with interest thereon.

It has already been mentioned that it was not open to the Court of the Judicial Commissioner to disturb the finding of the first appellate Court that the agreement was not harsh or extortionate, and that it was a fair bargain.

It is obvious, therefore, that the judgment and decree of the Court of the Judicial Commissioner should not be allowed to stand.

It remains to consider what is the proper decree on the facts of this case.

In view of the finding of the first appellate Court it must be taken that the agreement of the 11th November, 1912, was not extortionate, harsh or unconscionable, and that it was a valid and binding agreement. It is clear that the defendant committed a breach of the agreement by his failure to carry out the terms thereof, when his appeal to the Judicial Committee of the Privy Council, referred to in the agreement, was successful. The only other question is to what relief was the plaintiff entitled in the suit.

It was found, as already mentioned by the learned District Judge, that compensation in money was an adequate relief to the plaintiff, and this finding was affirmed by the Court of the Judicial Commissioner.

Their Lordships have already stated that there was evidence before the learned District Judge, who was the first appellate Court, which would entitle him to arrive at such a finding.

Consequently it must be taken for the purpose of this appeal that the above-mentioned finding stands. Their Lordships desire to add that they see no reason for thinking that the finding of the Courts in India in this respect was in any way incorrect.

The material provisions of the Specific Relief Act (Act 1 of

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1877) are Sections 12 (c) (d) and the Explanation thereto, 19, 21 (a) and 22 and are as follows:—

"12. Except as otherwise provided in this Chapter, the specific performance of any contract may in the discretion of the Court be enforced—

"(c) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or

"(d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

"EXPLANATION.—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved."

"19. Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

"If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

"If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

"21. The following contracts cannot be specifically enforced:—

(a) A contract for the non-performance of which compensation in money is an adequate relief.

"22. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.

"The following are cases in which the Court may properly exercise a discretion not to decree specific performance:—

"1. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the

defendant, though there may be no fraud or misrepresentation on the plaintiff's part."

Reliance was placed by the learned counsel for the plaintiff on the explanation to section 12, and urged that the learned District Judge was right in making a decree for specific performance.

The obvious answer is that in this case the presumption referred to in the explanation was rebutted because it was proved and found that the breach of the contract could be adequately relieved by compensation in money.

It was further argued that it was probable that pecuniary compensation could not be got for the non-performance of the act agreed to be done, and that consequently the case fell within Section 12 (d).

This point, as far as their Lordships can discover, was not taken in the Courts in India, nor was it mentioned in the reasons set out in the plaintiff-appellant's case on appeal to this Board.

The learned counsel for the plaintiff was not able to draw their Lordships' attention to any evidence which would justify them in holding that there is a probability that pecuniary compensation, if awarded, cannot be recovered. If there were any substance in this point, it would undoubtedly have been relied on by the plaintiff, because, if proved, it would have afforded a good ground for obtaining the decree for specific performance which he desired.

In view of the finding that compensation in money is an adequate relief to the plaintiff and in view of the express provisions contained in sections 12 (c) and 21 (a), their Lordships are of opinion that a decree for specific performance of the contract should not be made.

The decree, therefore, must be for compensation in money, and the only remaining question is one of amount.

There is no difficulty in this respect. It is clear that at the date of the breach of the contract the value of the village was about Rs. 20,000, and the learned District Judge held that the amount of the "damages," which he thought would have been an adequate relief, was Rs. 20,000.

The proper order, therefore, is that a decree in favour of the plaintiff should be made for Rs. 20,000, with interest thereon at the rate of 6 per cent. per annum until realization.

Consequently, their Lordships are of opinion that the plain-

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tiff's appeal should be allowed and that the decrees of the Courts in India should be set aside except in so far as the said decrees relate to the payment of costs, that a decree should be made in favour of the plaintiff as above mentioned, that the defendant should pay the costs of this appeal, and that the order of the Court of the Judicial Commissioner as to payment of costs contained in the decree of the 22nd August, 1925, should stand, and they will humbly advise His Majesty accordingly.

T. L. Wilson & Co : Solicitors for the Appellant.

Valpy, Peckham & Chaffin : Solicitors for the Respondent.

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Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice C. C. Ghose and Mr. Justice Page.

CURRIMBOY AND COMPANY, LIMITED.

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L. A. CREET AND OTHERS.*

Specific performance—Contract by correspondence—Complete contract—Terms in a correspondence—Question of law—Consent of parties—Company going into liquidation, effect of—Same rules apply as in bankruptcy—Contract subsisting—Contract, if rescinded—Notification by party of his insolvency—Trustee in bankruptcy—Specific performance of contract by bankrupt to buy a property—Different rule in contract to sell property—Trespass to land—Proper plaintiff in ejectment suit—Mere right to property without right to possession—One co-sharer, if can bring an action in trespass—Co-owners of mining parties—Right of conveyance—Co-owner's right to work the mine—Civil Procedure Code (Act V of 1908), O. 1 R. 10, O. 22 R. 10—No assignment or devolution—Proceedings when commence, when a person is added as defendant under O. 1 R. 10 of the Code of Civil Procedure—Damages, measure of—Allowances.

When it is sought to establish a contract by correspondence, the whole of the correspondence relating to the matter in question must be looked at for the purpose of finding out at what stage there was, if at all, a complete contract between the parties.

* Appeal from Original Decree No. 471 of 1928, against the decree of the Subordinate Judge of Asansol, dated the 12th October, 1928.

Where the cardinal points of a proposed contract are definitely agreed upon by letters, the mere fact that in the course of the correspondence, reference has been made to a more formal agreement or subsidiary non-essential stipulations, will not prevent the Court from considering the agreement arrived at by the letters as concluded: *Casley v. Walpole* (1).

If once a definite offer has been made and it has been accepted without qualification and it appears that the letters of offer and acceptance contain all the terms agreed on between the parties, the complete contract thus arrived at, cannot be affected by subsequent negotiation: *Bellamy v. Debenham* (2) and *Perry v. Sugfield* (3).

Where certain letters are stated as constituting the agreement, no testimony *aliunde* is admissible and subsequent letters cannot be referred to to aid in construing the contract contained in the material letters: *Lewis v. Nicholson* (4).

The question whether the terms contained in a correspondence amount to a binding contract between the parties is one of law: *Chesley v. Fuller* (5).

Even if there be a complete contract between the parties, such contract can be put an end to by the consent of the parties: *Carolus v. Brabson* (6).

The effect of a Company going into liquidation while a contract entered into by the Company before liquidation is subsisting, is the same as when a party to a contract becomes bankrupt or insolvent. The bankruptcy or insolvency of a party may not alone necessarily result in such an incapacity to perform the contract as to entitle the other party at once to treat it as broken and to claim damages: *Broske v. Hewitt* (7); as it may be for the benefit of the bankrupt or insolvent or of his estate to complete the contract and the representatives of his estate may be authorized to do so: *Esparis Stapleton* (8). Nor does bankruptcy or insolvency alone entitle the other party to rescind the contract; but a notification by a party of his insolvency may be taken as presumptively importing an offer to rescind which the other party may accept; and it would at least justify a refusal on his part to complete the contract unless the insolvent or his representatives should prove his ability and readiness to complete his part: *Esparis Chalmers* (9). If the bankrupt before bankruptcy has contracted to sell or mortgage, the trustee in bankruptcy takes it subject to an obligation to fulfil the contract. If, for instance, it is a contract to grant a lease, the trustee in bankruptcy may obtain specific performance of the contract if he agrees to be personally bound by the covenant: *Powell v. Lloyd* (10). The contract, however, has got to be performed by the trustee in bankruptcy, if he chooses to perform it at all, within a reasonable time; and, if it is not performed within a reasonable time, the other contracting party may treat the contract as having been abandoned: *Laurence v. Knowles* (11) and other cases. The position, therefore, being that the trustees of a bankrupt may disclaim an onerous contract or may

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(1) (1870) 39 L. J. Ch. 609; 18 W. R. 782. (2) [1891] 1 Ch. 413.

(3) [1916] 2 Ch. 187.

(4) (1852) 18 Q. B. 503.

(5) (1853) 13 C. P. 122.

(6) (1846) 3 Jon. & Lat. 200; 9 Ir. Eq. 224.

(7) (1796) 3 Ves. Jr. 233.

(8) (1879) 10 Ch. D. 586.

(9) (1873) 42 L. J. Ch. 37; L. R. 8 Ch. 294.

(10) (1826) 1 Y. and J. 427; 2 Y. and J. 372. (11) (1839) 5 Bing. N.C. 399.

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perform all that the bankrupt was neglecting to perform at the time when he was bound to perform them, and the bankruptcy having no other effect on the contract than to put the trustee in the place of the bankrupt neither rescinding the obligation on either side nor imposing new ones, nor anticipating the period of performance on either side, if the trustee does all that the bankrupt ought to have done, he may recover against the contracting party the damages which the bankrupt himself could have recovered if he had performed the contract; or if he omits to do so and neglects to perform the contract, he loses the benefit of the contract and the other party has his remedy against the bankrupt's estate: *Gibson v. Carruthers* (1). The law does not require that the trustee in bankruptcy should give express notice within a reasonable time after the date of the bankruptcy of his adoption of the contract. The law only requires the trustee in bankruptcy to perform the bankrupt's part of it as and when he should have done it himself: *Gibson v. Carruthers* (2).

Specific performance of a contract by a bankrupt to buy a property is not ordinarily granted against the trustee in bankruptcy of a vendee without his consent: *Holloway v. York* (3). Aliter in the case of a contract to sell property.

Trespass is wrong to another's possession; it is an injury to a possessory right and therefore the proper plaintiff in an action for trespass to land is the person who is in actual or constructive possession of the land, that is, entitled to immediate possession. The gist of the action of trespass must be and is the wrong to the right of the plaintiff's possession. The right to possession is all important in an action for trespass; and a mere right to property without a right to possession is not sufficient to support the action. Right to possession is one of the constituent elements of the complete right of property; a person with a right to possession can always maintain an action of trespass against a wrong-doer. So also in the case of a person in actual possession. Such a person has against a mere stranger or wrong-doer the same remedies as if he had the right to possession and he can as against the stranger maintain trespass and in general the stranger who violates his possession cannot justify the violation by showing that the possession was without title or even by showing that it was wrongful, unless he further proves not only that a third person was entitled to the possession but that he, the stranger, had acted with the authority of the said third person. The fact of possession in the sense referred to above therefore is *prima facie* evidence of title, and is alone sufficient to sustain the plaintiff's case against a mere wrong-doer.

A co-sharer can by himself maintain an action of trespass against a wrong-doer: *Syed Ahmed Sahib Shuteri v. The Magnesite Syndicate, Limited* (4) and *Maganlal v. Budhar* (5).

The co-owners of mining parties have a right to convey without reference to other co-owners: *Bentley v. Bates* (6).

Each co-owner is entitled to work the mines provided he does not take more than his share of the minerals nor work the same wastefully. A person who is a co-owner of a mine with another or others, whether as joint tenant, tenant in common or co-parcener, can enter upon and work the mine or license another

(1) (1841) 8 M. & W. 321; 58 R. R. 713. (2) (1841) 8 M. & W. 321 (334).

(3) (1877) 25 W. R. (Eng.) 627.

(4) (1915) I. L. R. 39 Mad. 501.

(5) (1926) I. L. R. 51 Bom. 140.

(6) (1840) 4 V. & C. Ex. 182.

person to do so, subject only to the restriction that he shall not take more than his share: *Jeb v. Patten* (1) and other cases.

O. 22 R. 10 of the Civil Procedure Code has no application where there was no assignment nor any contract in respect of which there can be an assignment, creation or devolution of any interest in party's favour: *Maharaja Sir Manindra Chandra Nundy v. Ram Kumar Lal Bhagat* (2).

The proceedings against a person added as defendant under O. 1 R. 10 commence from the date when he is so added.

The measure of damages in a case like the present is the fair market value of the coal at the pit mouth at the time when it was severed subject to just allowances. As to what allowances there shall be, depends on the conduct of the parties and the other circumstances of the case. There are two rules—(a) the harsher, under which only the cost of bringing the coal to bank is allowed and (b) the milder, under which the expense of hewage and haulage *i. e.*, the cost of working and severing as well as of bringing to bank is allowed. The harsher rule, only allowing the expense of bringing to bank, has been applied where the misconduct has been of a substantial character: *Examples given*. The milder rule, allowing the deduction of the expense of working and severing the coal as well as of bringing it to bank, will be applied where the wrongful working has not been done with guilty or negligent mind, or sinister intention: *Examples given*.

C, the plaintiff's allegation was, that he acquired certain coal lands in pursuance of an agreement with the defendant company (J. and Co.), whereby the latter agreed to pay him, the price of acquisitions of lands, the rents &c. payable by him to his lessor, to advance monies for further acquisition of lands, and to deposit a certain amount as earnest money with him; that he was induced to spend large sums of money to carry on 'testing' and 'winning' operations in the coal lands; that the defendant company were bound under their agreement to pay all these monies to him and to take a conveyance from him in respect of the lands acquired by him in terms of the agreement. This suit was instituted for specific performance of the said agreement, or, in the alternative, for damages in respect of the breach and in respect of the coal raised by the defendant company, who were given possession by the plaintiff, and also for damages for trespass. The appellants were the alleged transferees from the defendant company.

The defence admitted the agreement but denied its terms as alleged by the plaintiff. The defendant company, it was alleged, were all along willing to perform their part of the agreement on plaintiff's making out a good title to the lands acquired by him but he failed to make out such title:

Held, that even if there was a complete contract between the parties, neither party could ask for its specific performance, as the first contract had been put an end to by mutual consent and as the only subsisting contract had been abandoned by the defendant company long before the institution of suit.

That the plaintiff as a co-sharer lessor could not eject the defendant company, and in lieu of ejectment would get damages on the basis of the value of the coal to the extent of his share in the property which had been worked by the defendant company, from which would be deducted the cost of working and severing the coal and bringing the same to the bank.

(1) (1875) L. R. 20 Eq. 84. (2) (1922) L. R. 49 I. A. 220; 36 C. L.J. 542.

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Appeal by some of the Defendants.

Suit for damages for breach of contract for the sale and purchase of certain lands with mining rights thereunder, for recovery of Khas possession &c.

The material facts appear from the judgment.

Messrs. N. N. Sircar (Advocate-General), S. M. Bose, Rupendra Kumar Mitter, S. C. Mitter, R. N. Sircar and K. N. Bose for the Appellants.

Messrs. L. P. E. Pugh, Sarat Chandra Bose, Dr. Bijan Kumar Mukherjee, Messrs. N. K. Bose and S. S. Sarkar for the Plaintiffs Respondents.

C. A. V.

August, 23.

The following judgments were delivered :—

C. C. Ghose, J :—The suit, out of which this appeal has arisen, was instituted by the plaintiff on the 14th May 1924 in the Court of the Subordinate Judge at Asansol against Messrs. Oosman Jamal & Sons Limited for damages for breach of contract for the sale and purchase of certain lands with mining rights thereunder in Mouzah Khandra in the district of Burdwan, for recovery of Khas possession of certain properties of which possession had been given to the said defendants pending completion of the contract and particulars whereof are given in the plaint, and for an account of certain quantities of coal which had been raised by the said defendants or, in the alternative, for specific performance of the said contract and for other reliefs as stated in the plaint.

More than 2 years after the institution of the suit, namely, on the 30th June 1926, an order for compulsory liquidation of Messrs. Oosman Jamal & Sons Limited was passed by this Court on its Original Side and a Mr. R. Ray, Chartered Accountant, was appointed Liquidator. The Liquidator was thereupon added as a defendant to this suit on the 13th July 1926. On the 21st of August 1926 the present appellants Messrs. Currimbhoy & Co. Ltd. (hereinafter called Currimbhoys) applied to the learned Subordinate Judge to be added as defendants to this suit. In their application for addition as defendants, Currimbhoys stated that Messrs. Oosman Jamal & Sons Ltd. (hereinafter called Jamals) undertook sometime in September 1922 to provide for them a "coal mining property" known as Khandra colliery comprising about 400 bighas of coal bearing lands in one block with all rights, buildings, shafts, machinery, plant and implements for the proper working of a colliery, and that pursuant to that agreement they had advanced to Jamals a large sum of money amounting to about five lacs of

rupees, with part of which the said colliery had as a matter of fact been developed ; that the said colliery had "long" been managed by Jamals on their behalf as managing agents, and that they were the real owners of the said colliery. They further stated that in these circumstances, although no conveyance of the said colliery and lands had been executed in their favour, they were the only persons interested in the property which was the subject matter of the litigation, and that as the pecuniary condition of Jamals had then become precarious, they had been obliged to take over direct possession and management of the said colliery from the 7th May 1926.

The plaintiff at first strenuously objected to Currimbhoys being added as defendants to this suit and the grounds upon which such objection was based were set out in the plaintiff's petition dated the 18th September, 1926. In the so grounds the plaintiff denied all the allegations of fact relied upon by Currimbhoys. Currimbhoys' application however was not disposed of by the Court till the 28th July 1927, when, as appears from the order sheet, the plaintiff having agreed to their being added as defendants to this suit without prejudice to his objections, an order was made by the learned Subordinate Judge adding Currimbhoys as defendants. Thereafter Currimbhoys filed their written statement on the 12th August, 1927, but the issues arising on the pleadings as they then stood were not finally settled till the 21st August 1928. The suit eventually was disposed of by the learned Subordinate Judge by his judgment and decree dated the 12th October, 1928.

In Schedule 1 to the plaint the plaintiff described the lands and the minerals thereunder in respect of which he prayed for Khas possession. The plaintiff adduced considerable evidence shewing the raisings of coal since the 19th February 1923. On consideration of this evidence and of the other evidence bearing on various other points in the case, the learned Subordinate Judge passed the following decree in favour of the plaintiff: "The plaintiff do get Khas possession of all the lands (surface or underground) now owned by the defendant in Mouza Khandra described in Schedule 1 of the plaint ; defendants do pay to the plaintiff Rs. 5,49,445 plus costs of the suit. The defendants are directed to remove their structures, boilers, machinery, etc. within 2 months from this day. On failure, the plaintiff will be entitled to apply in the execution proceedings for their removal and disposal and will get the costs which he will have to incur. The decree will bear interest at 6 per cent. per annum till realisation. The plaintiff do pay

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deficit Court-fees on Rs. 3,49,445 on or before 30th November 1928. On failure, the decree will be prepared on the basis of damages at 2 lacs for which Court-fees have been paid."

Against this decree, the present appeal has been brought by Currimbhoy; there is no appeal by Jamals as represented by the liquidator. Now, in order to understand the various contentions which have been advanced before us on behalf of Currimbhoy and which are hereinafter referred to, it is necessary to set out at some length the facts involved in the present litigation and a short history of the plaintiff's title to the lands in suit, and I will therefore now proceed to do so.

Mouzah Khandra within Touzi No. 12 of the Burdwan Collectorate consisting of 5545 Bighas appertains to the Zemin-dari of the Maharajadhiraj of Burdwan. The entire area is sub-divided as follows: (A) Khandra proper; (B) Kismat No. 1; (C) Kismat No. 2; (D) Chuck Talabanka; (E) Bajcapi lands and (F) Khas Khalasi lands. It appears that many years ago, the Maharaja of Burdwan granted a patni lease of (A) and (B) to certain gentlemen who are known as the Ukhra Babus. The last named persons in their turn granted a dar-patni of (A) to certain persons who are known as the Sahays of Arrah. Thereafter the Maharaja of Burdwan granted a mining lease of (A) to the said Sahays of Arrah; and apparently sometime previously, certain people known as the Buxis had taken a patni lease of (C) and (D) from the Maharaja. On the 8th January 1915 the Maharaja of Burdwan and the said Sahays granted a prospecting lease or Amalnama to one Kangal Chandra Mandal for the purpose of examining the 'coal lands' in and of Mouzah Khandra for a period of three years on certain terms and conditions specified in the lease which is marked Exhibit 317. From the boundaries set out in the schedules thereto it would appear that the lease in question covered the entirety of Mouzah Khandra and it was expressly agreed between the parties that at the end of the said period of three years, the lessee would be entitled to obtain a mining lease of Mouzah Khandra for a period of 999 years. On the 9th March 1915, Kangal Chandra Mandal sold a moiety of his right, title and interest under the said prospecting lease for a sum of Rupees twenty five thousand to one Taranath Dutt (Exhibit 18). On the 28th October 1915, the Maharaja of Burdwan granted a mining lease of (B) to Rai Pulin Behari Lal Sinha Handay Bahadur and two others. On the 17th December 1918, the lessee Kangal Chandra Mandal, ignor-

ing the grant he had already made in favour of Taranath Dutt, purported to grant a prospecting lease for a period of eight months commencing from the 1st January 1919 of the whole of Mouzah Khandra in favour of one F. D. Boga (Exhibit T). It appears that sometime thereafter the plaintiff, L. A. Creet, who had acquired some sort of interest in and was in possession of certain Bajespti and Khas Khasasi lands i. e. lands in (E) and (F), got into touch with the said F. D. Boga and entered into an agreement with him on or about the 7th May 1919 to purchase his right, title and interest under the grant in his favour by Kangal Chandra Mandal. It appears that the latter had not been able to obtain from the Maharaja and the Sahays a mining lease of Mouzah Khandra within the time limited as above, but what he had done was this—he had succeeded in obtaining an extension of time from his lessors up to the end of Pous 1326, to apply for a mining lease on payment to his lessors of certain sums of money which he had obtained as advances from Taranath Dutt. The plaintiff, Creet, who had heard of Taranath having been left out, wanted to make his position secure, and accordingly he entered into an agreement with Taranath Dutt on or about the 28th July 1919 under which he became entitled to prospect for coal in Mouzah Khandra up to the end of Pous 1326 corresponding with the 14th January 1920. The terms and conditions under which the said prospecting lease was obtained from Taranath Dutt are set out in Exhibit (329). On the 29th July 1919 Kangal Chandra Mandal obtained a mining lease of Mouzah Khandra from the Sahays. See Exhibit (3218). The Maharaja of Burdwan, who was to have joined the Sahays, however refused to sign the lease; and the result was that Kangal Chandra Mandal had to institute a suit against the Maharaja for specific performance of the contract with him. That suit was disposed of on the 14th April 1927. The decree in that suit directed that the Maharaja of Burdwan should execute a lease as prayed in favour of Kangal Chandra Mandal on payment by him of a sum of Rs. 14000 within four months from the date of the decree and that in default, the plaintiff Kangal Chandra Mandal would be entitled to have the lease executed by the Court for and on behalf of the Maharaja of Burdwan. As a matter of fact, the lease was not executed by the Maharaja but was ultimately executed by the Court in terms of the decree of the 1st November 1927 on deposit of a sum of Rs. 14000. As regards Taranath Dutt, he had instituted a suit against the

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Maharaja of Burdwan and others to enforce his rights. This suit was, however, dismissed for default on the 12th April 1927. Now, as regards the Ukhra Babus; the properties belonging to them had been partitioned and, as a result thereof, Pulin Behari Singh became entitled to (B). Pulin granted a mining lease of (B) to one Haridas Mukherji and the latter, in his turn, granted a similar lease of (B) to the plaintiff L. A. Creet on the 21st November, 1920; (Exhibit 3f). It was stated before us that the lease covered an area of 200 bighas approximately. Now, as regards the Bajeapti and Khas Khalasi lands; it appears that the plaintiff Creet was able to get mining leases in respect of certain of the areas comprised therein, but he had not succeeded in acquiring the interest of one Jyotish Chandra Sircar and some of his co-sharers. There was some contention raised as to whether the holders of the Bajeapti and Khas Khalasi lands were entitled to the minerals thereunder or whether the Maharaja of Burdwan, as the zemindar, was entitled to the same. Be that as it may, it appears that the plaintiff Creet succeeded on the 18th October 1921 in obtaining from the Maharaja of Burdwan a mining lease of 825 Bighas of Bajeapti and Khas Khalasi lands in the said Mouza Khandara (See Exhibit 3210). So much for the title as regards the property which is the subject matter of the present suit.

Two other matters must be mentioned. The plaintiff alleged that Jyotish Chandra Sircar and his co-sharers who were interested in certain Bajeapti lands had entered into a contract with him to grant a mining lease. This was not admitted by the Sircars, and the plaintiff had to institute a suit against the Sircars for specific performance of the said alleged contract. The suit was dismissed by the Subordinate Judge of Asansol on the 25th June 1927 and it has been stated before us that the decree dismissing the suit has since been affirmed by this Court on appeal. Creet also instituted a suit against Boga and others for specific performance of the agreement of the 7th May 1919. This suit also was dismissed by the Additional Subordinate Judge of Asansol on the 30th April 1928 and it is said that an appeal against the decree is now pending.

Now, in the early part of May 1920, Jamals were carrying on business in Calcutta, and were on the look-out for coal lands in and near about RaneeGUNGE. They had in their employment a mining Engineer named H. C. Reid who was on friendly terms with the plaintiff Creet. Reid, acting on behalf of Jamals, got

into touch with Creet and his object was to acquire mining rights for Jamals from, or with the instrumentality of, the plaintiff. On the 18th April 1920 Creet, who had paid Selamis to owners of various Bajcapi lands for the purpose of acquiring mining rights thereunder and had got possession of certain Bajcapi lands, writing to Reid proposed certain terms which were to the effect that Jamals should advance to him a sum of Rs. 50,000 immediately, and that when he got mining leases from the Bajcapi holders and succeeded in winning the suit which was then pending against Boga and in acquiring Boga's title and further succeeded in obtaining a mining lease from Taranath Dutt after the latter had managed to obtain title from the Maharaja of Burdwan, he Creet would assign the rights hereinbefore mentioned to Jamals in consideration of Jamals paying Rs. 90 per bigha as Selami in addition to the royalties etc. payable to the superior owners and that when Jamals' title was finally completed, the said Rs. 50,000 would be taken into account. There were various other matters mentioned in the letter of the 18th April 1920, but the above is, I think, a fair and an intelligible account of the material terms proposed by the plaintiff. Creet, who is an Armenian, does not write correct English. On the 20th April 1920 Jamals made a counter offer which, however, was not accepted by the plaintiff. On the 26th April 1920 Jamals intimated to the plaintiff that they had agreed to consider his terms. On the 13th May 1920 Jamals proposed that they should take over "this place" (meaning the area where mining operations had already been begun by the plaintiff) immediately for the purpose of "sinking and opening out" under the supervision of their Manager, Mr. Seth Ram and that this should be done subject to "ratification" by their solicitors "as arranged for the acquisition of the property" from Creet (See Ex. 1 (d)). On the 13th May 1920, Messrs. Morgan & Co., who were Jamals' solicitors, put in writing what they understood to be the terms on which the advance of Rs. 50,000 was to be made by Jamals, and a copy of Messrs. Morgan & Co's letter dated the 13th May 1920 was forwarded by Jamals to the plaintiff, and the plaintiff was asked whether he agreed to act on the opinion of Messrs. Morgan & Co. The letter of the 13th May 1920 from Jamals was acknowledged by Creet on the 15th May 1920, and the plaintiff authorised Jamals to start work at once. On the 15th May 1920 the plaintiff wrote again and informed Jamals that he was agreeable to act on the opinion of the solicitors

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(Messrs. Morgan & Co.) if they were also agreeable. On the 17th May 1920, Jamals wrote to the plaintiff as follows:—"Yes, we are agreeable to act on the opinion of the solicitors and since you are agreeable also, we shall get in touch with Messrs. Morgan & Co. today and ask them to draw an agreement on the terms agreed upon". On the 18th May 1920, Jamals informed Creet that payment would be made on the agreement being signed and registered and that they would try and persuade Messrs. Morgan & Co. to do this as soon as possible. As a matter of fact, the agreement was not drawn up then or for some time thereafter; but on the 1st June 1920 Jamals were allowed to take possession of the property which was briefly described in the correspondence as "Khandra." Nothing was done in the matter of the execution of the agreement in 1920 or for the matter of that in 1921; but it appears that Jamals paid to Creet on various dates between the 25th June 1920 and the 28th November 1920 several sums aggregating Rs. 30,000. In November 1921 Jamals received a bill from Creet for Rs. 4000 on account of minimum royalty, surface rent and selami and they wrote to Creet to say that they would pay the amount if Morgan & Co. were prepared to pass the title and get the documents ready. A demand was also made by Creet for payment of a sum of Rs. 3641-15-9 pice on account of certain expenses which Creet had been put to and which, it was understood, Jamals would pay. Jamals paid the said two amounts in question to Creet on or about the 27th November 1921 although no progress had been made in drawing up the agreement hereinbefore referred to. It appears that the examination of Creet's title was for various reasons not proceeded with rapidly and completed, although Messrs. Morgan & Co. reported on the 27th February 1922 that Creet had got title to 106 bighas of Bajeapti lands, 100 bighas of mal lands and 825 bighas of Bajeapti and Khas Khalasi lands under the lease from the Maharaja of Burdwan. Creet was requested to complete his acquisitions of Bajeapti and Khas Khalasi lands so as to make up a block of 600 Bighas; but Creet stated that there was no such understanding, and that Jamals had agreed to take such lands, whether in one block or otherwise, as he could get. There were interviews and correspondence in 1922, and it appears that on the 13th October 1922 Creet wrote to Jamals saying that if Morgan & Co. did not approve of the title, then they, Jamals, should stop raising coal at once. On the 9th October, 1922, Narendra Mohan Chatterji, pleader, Asansol, who was acting on behalf of Creet, wrote to

Jamals reminding them of the balance due by them of Rs 20,000 and calling upon them to pay the said sum as also another sum of Rs. 40,000 and suggesting that they should place a further sum of Rs. 1,50,000 in deposit with their Solicitors Messrs. Morgan & Co. "for settlement of the disputes regarding the property" which were going on. A lengthy reply to this letter of Mr. Chatterjee was sent on the 17th November 1922 by Jamals in which they gave their version of what they understood to be the contract between the parties and of what had happened since then. Jamals asked that there should be a conveyance of the mining rights already acquired by Creet and covered by the documents which had been deposited by Creet and that Creet could go on acquiring further mining rights in areas "under titles which were to be approved by their solicitors." On the 8th January 1923 there was a meeting between Reid, Creet, Ashraf Jamal of Jamals and Jamals' Manager, Seth Ram at the Century Colliery and certain terms, according to Jamals, were agreed upon at the said meeting. These terms are to be found in a letter dated the 10th January 1923 from Jamals to Creet (see page 117, Vol. II, Part. 11). On the 15th January 1923 Jamals sent to Creet a draft conveyance of 1025 Bighas which had been drawn up by Messrs. Morgan & Co. (see Exht. L). Creet, however, was not prepared to accept the draft conveyance and he forwarded the same to his lawyer for his corrections. The lawyer referred to is Narendra Mohan Chatterji, and instead of sending the draft conveyance after correction by him Chatterji sent on the 23rd January 1923 a draft agreement which according to Creet had to be first executed by Jamals before the question of the execution of the draft conveyance could be taken up. Meanwhile, Chatterji prepared a draft conveyance which is Exht. M and which was sent to Jamals, and on the 2nd February 1923 he, Chatterji, fixed fifteen days' time for the completion of the transaction, that is, for the execution of the agreement and the conveyance. Various difficulties thereafter arose with the result that Creet through his pleader gave notice on the 19th February 1923 asking Jamals to stop all work and stating that inasmuch as Jamals "had failed to obtain title from him" they would be regarded as trespassers. A suggestion was made by Messrs. Morgan & Co. in June 1923 that there should be a settlement of outstanding disputes, and on the 30th July 1923 Creet opened correspondence with Jamals "without prejudice." On

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the 23rd November 1923 Messrs. Orr Dignam & Co. who were then advising Creet, made certain suggestions to Jamals for settlement of the disputes. The main points were that Jamals should execute the agreement prepared by Chatterji (which is Exhibit 2 in this case) subject to such modifications as might be approved by Messrs. Orr Dignam & Co.; that Jamals should undertake to pay all minimum royalties and rents to the superior landlords as from the date on which they commenced to be payable with interest thereon at 15 per cent. per annum, and that they should also pay all costs of the acquisition of surface lands with like interest and further should undertake to pay a royalty on all bricks manufactured, and to take over and acquire the twenty odd bighas of surface land taken up by Mr. Boga at a Selami of Rs. 100 per Bigha and an annual rent of Rs. 10 per bigha. These points were re-stated by Messrs. Orr Dignam & Co. in their letter of the 18th December 1923 and were accepted by Jamals on the 28th December 1923. The only question which then remained outstanding was the preparation of the necessary documents. It appears, however, that instead of the documents being got ready, correspondence was embarked upon between Messrs. Orr Dignam & Co. and Jamals which laid to no useful result; and the latter were finally served with notice that until the transaction was completed by the 31st March 1924, Creet would cancel the "arrangement" i. e. the contract. Nothing was done and finally, as stated above, the present suit was instituted on the 14th May 1924.

As stated above Currimbhoy came into this suit more than two years after the institution thereof; but although they were added as defendants in July 1927 and were allowed to file a separate written statement, the plaint, as it was originally filed, remained unamended. On this appeal it was vigorously argued by the learned Advocate-General on behalf of Currimbhoy, when this appeal was opened before us, that the plaintiff had no title and had acquired no title to the lands, khas possession whereof was prayed for by him, and that in any event, having regard to the fact that Jamals were invited by the plaintiff to go into possession of the property and had spent money thereon for the purpose of raising coal and further that Currimbhoy had advanced a large sum of money to Jamals on the security of the property and the colliery thereunder, and were in possession of the same through Jamals as their Managing Agents, they were entitled to obtain specific performance of the con-

tract, at any rate to the extent of 400 bighas, they waiving all questions as regards Creet's title thereto and their right to claim compensation or abatement. The learned Advocate-General argued that if on the correspondence between the parties between the 18th April and the 18th May 1920 the Court came to the conclusion that there had been a concluded agreement between the parties and that such agreement was still subsisting, there was no reason why specific performance of the agreement to the extent claimed by Currimbhoys should not be granted. The learned Advocate-General further argued that if, contrary to his submission, the Court came to the conclusion that there had been no such concluded agreement, the Court ought to consider the agreement arrived at between the parties and embodied in the letter of the 10th January 1923 referred to above, and decree specific performance thereof in favour of Currimbhoys. He further argued that if the Court was of opinion that the terms set out in the letter of the 10th January 1923 had not been accepted unconditionally by Creet, there could however be little doubt that the letters of the 23rd November, 1923, 18th December, 1923, and the 28th December, 1923, taken together, did amount to a concluded agreement and that Currimbhoys were, at any rate, entitled to obtain specific performance of that last mentioned agreement. It was also contended on behalf of the appellants that in the events which had happened and having regard to the state of Mr. Creet's alleged title to the property in suit, the decree for damages made by the Court below should be discharged.

Before I deal with the above contentions and with the elaborate argument which has been addressed to us by Mr. Pugh, who appeared for the plaintiff respondent Creet, I must state shortly what the position of Currimbhoys was in this matter. It appears that two shafts had been sunk in a place called Karabagan. Certain persons known as the Sircars (i. e., Jyotish Sircar and his co-sharers) had a half anna share in Karabagan. Creet had been trying to negotiate with the Sircars for a mining lease but Jyotish Sircar and some of the other Sircars were standing out. Jamals, who were carrying on the mining operations in Karabagan had not, however, the necessary finance wherewith to carry on such operations. They were, however, friendly with Messrs. Currimbhoys & Co. Ltd. of Bombay of which Company Sir Fazulbhoys Currimbhoys (who was connected with Athraf Jamal of Jamals) was a director. Jamals succeeded in

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inducing Currimbhoy to lend to them on or about the 3rd November 1921 as a short period loan a sum of Rs. 4,00,000 bearing interest at the rate of six per cent per annum. The loan was not repaid in proper time as promised by Jamals, and on 11th September 1922 Jamals proposed to Currimbhoy that they would be prepared to transfer to them 400 bighas of the Khandra property together with all mining rights etc., as also all machinery then lying on the property, provided it (i.e. such transfer) was applied to the liquidation of the account between Jamals and Currimbhoy. Jamals stated that the proposal was an advantageous one, and that while the cost of raisings could be taken at Rs. 5—8 annas per ton, the sale price would be about Rs. 12 and that this would leave a margin of Rs. 6—8 annas per ton as clear profit. Apparently Currimbhoy fell in with Jamals' suggestion and it was agreed on or about the 13th September 1922 between Jamals and Currimbhoy that the debt due by Jamals would be wiped off by the transfer of 400 bighas of Khandra with the colliery and machinery etc. and that the colliery would be managed on behalf of Currimbhoy by Jamals on a 5 per cent profit commission basis. Currimbhoy thereupon instructed Messrs. Morgan & Co. to draw up necessary documents giving effect to the agreement to transfer the said 400 bighas of Khandra with a colliery and machinery etc. It is to be noticed that at this date Jamals had not obtained any title from Creet except the right to be in possession; but it has been argued that there can be little doubt from a consideration of the documents set out on pages 175, 176, 177, 178, 179, 181, 182, 183, 184, 188, 189, 192, 193, 194, 195, 200, 203, 204, 205, 206, 216 and 227 of Volume II Part II of the paper-book, that Currimbhoy were in possession of the property including the colliery from September 1922 through Jamals as their managing agents, and that they (Currimbhoy) have spent a large sum of money for the purpose of developing the property. It was also contended that such money was spent by Currimbhoy on the footing that there was a subsisting agreement between Creet and Jamals which they could adopt and of which they obtained an assignment and in respect of which they were entitled to claim specific performance.

Before I proceed further, I think it will be convenient if at this stage I dispose of the contention of the learned Advocate-General that Currimbhoy are entitled to claim specific performance of, at any rate, one of the three contracts referred to above. For

the reasons which I am about to state, in my opinion, this contention must be negatived.

I start with the contract of April-May 1920. The contract, if any, was contained in certain letters which passed between Creet and Jamals. Now, where it is sought to establish a contract by correspondence, the rule is that the whole of the correspondence relating to the matter in question must be looked at for the purpose of finding out at what stage there was, if at all, a complete contract between the parties. There are numerous authorities in support of this proposition. It has been held that where the cardinal points of a proposed contract are definitely agreed upon by letters, the mere fact that in the course of the correspondence, reference has been made to a more formal agreement or subsidiary non-essential stipulations, will not prevent the Court from considering the agreement arrived at by the letters as concluded. (See *Cayley v. Walpole* (1)). It is also clear that if once a definite offer has been made and it has been accepted without qualification and it appears that the letters of offer and acceptance contain all the terms agreed on between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiation. [See *Bellamy v. Debenham*, (2); *Perry v. Suffield* (3)]. Again it is equally clear that where certain letters are stated as constituting the agreement, no testimony *aliunde* is admissible and subsequent letters cannot be referred to to aid in construing the contract contained in the material letters. [See *Lewis v. Nicholson* (4)]. Bearing in mind the rule laid down in the above cases and also that the question whether the terms contained in a correspondence amount to a binding contract between the writers is one of law [*Chevelley v. Fuller*, (5)], I am of opinion that even if there was a complete contract between the parties i.e. Creet, and Jamals in April-May 1920, such contract was put an end to by the consent of the parties [See *per* Lord St. Leonards in *Carolan v. Brabazon* (6)], and the only contract which ultimately emerged from the correspondence as having been made by and between the parties and was in force was the contract which was contained in the letters of the 23rd November 1923, 18th December 1923 and 28th

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(1) (1870) 39 L. J. Ch. 609.

(2) (1891) 1 Ch. 412.

(3) (1916) 2 Ch. 187.

(4) (1852) 18 Q. B. 502.

(5) (1853) 13 C. P. 122.

(6) (1846) 3 Jones & Lat 200 (200-209) 19 Ir. Eq. 224.

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December 1923. I am of opinion that there was no contract concluded between the parties in January 1923 as it is quite clear that the terms embodied in the letter of the 10th January 1923 were not accepted by Creet at any time. The position, therefore, being that the only contract between Creet and Jamals which mattered was the contract in December 1923, let us next see what happened after that date. As I read the correspondence from December 1923 onwards no time was ever agreed or insisted upon by the parties for the performance of the contract contained in the letters of the 23rd November 1923, 18th December 1923, and 28th December, 1923. In these circumstances the contract in question had to be performed within a reasonable time from the date of the contract by Jamals. Whether in the present case a reasonable time had elapsed between the date of the contract in question and the date of the institution of this suit is a matter now of academic interest in view of subsequent events. I will assume for the purposes of argument that the contract in question was subsisting even at the date of the institution of the suit. Jamals, however, went into liquidation in June 1926 and a liquidator was appointed to wind up Jamals compulsorily. What was the effect of Jamals having gone into liquidation on this contract? It is not disputed that the effect of a Company going into liquidation while a contract entered into by the Company before liquidation is subsisting is the same as when a party to a contract becomes bankrupt or insolvent. Now, the bankruptcy or insolvency of a party may not *alone* necessarily result in such an incapacity to perform the contract as to entitle the other party at once to treat it as broken and to claim damages [See *Brooks v. Hewitt* (1)]; as it may be for the benefit of the bankrupt or insolvent or of his estate to complete the contract and the representatives of his estate may be authorised to do so. [*Ex parte Stapleton* (2)]. Thus where a Banking Company after giving a letter of credit undertaking to accept bills to be drawn against Bills of Lading stopped payment before it was used, it was held that there was no breach for which the holder of the letter could prove damages in the winding up, because there had been no refusal to accept this and the liquidator might be authorised to carry out the contract and accept them. [*Ex parte Tondour* (3)]; nor does bankruptcy or insolvency *alone*

(1) (1796) 3 Ves. Jr. 253.

(2) (1879) 10 Ch. D. 586.

(3) (1868) 37 L. J. Ch. 121.

entitle the other party to rescind the contract ; but a notification by a party of his insolvency may be taken as presumptively importing an offer to rescind which the other party may accept : and it would at least justify a refusal on his part to complete the contract unless the insolvent or his representatives should prove his ability and readiness to complete his part. [*Ex parte Chalmers*, (1)]. If the bankrupt before bankruptcy has contracted to sell or mortgage, the trustee in bankruptcy takes it subject to an obligation to fulfil the contract. (See 2 Halsbury 156). If, for instance, it is a contract to grant a lease, the trustee in bankruptcy may obtain specific performance of the contract if he agrees to be personally bound by the covenant. See *Powell v. Lloyd* (2). As to the position of a trustee who completes the contract see *Drew v. Joselyne*, (3). The contract, however, has got to be performed by the trustee in bankruptcy, if he chooses to perform it at all within a reasonable time ; and if it is not performed within a reasonable time the other contracting party may treat the contract as having been abandoned. See *Laurence v. Knowles* (4) ; *Morgan v. Bain* (5) ; *Ex parte Stapleton* (6). The position therefore being that the trustees of a bankrupt may disclaim an onerous contract or may perform all that the bankrupt was neglecting to perform at the time when he was bound to perform them, and the bankruptcy having no other effect on the contract than to put the trustee in the place of the bankrupt neither rescinding the obligation on either side nor imposing new ones, nor anticipating the period of performance on either side, if the trustee does all that the bankrupt ought to have done, he may recover against the contracting party the damages which the bankrupt himself could have recovered if he had performed the contract ; or if he omits to do so and neglects to perform the contract, he loses the benefit of the contract and the other party has his remedy against the bankrupt's estate [See per Parke B in *Gibson v. Carruthers* (7)]. The law does not require that the trustee in bankruptcy should give express notice within a reasonable time after the date of the bankruptcy of his adoption of the contract. The law only requires the trustee in bankruptcy to perform the bankrupt's

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(1) (1873) 42 L. J. Ch. 37 ; L. R. 8 Ch. 294.

(2) (1826) 1 Y. & J. 427 ; 2 Y. & J. 372.

(3) (1887) 18 Q. B. D. 596.

(4) (1839) 5 Bing. N. C. 399.

(5) (1874) L. R. 10 C. P. 15.

(6) (1879) 10 Ch. D. 586.

(7) (1841) 8 M. & W. 321 ; 58 R. R. 713.

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part of it *as and when he should have done it himself* (See per Parke B in *Gibson v. Carruthers*, (1) at page 334). It may be stated in passing that Mr. Pugh on behalf of Creet did not ask before us for specific performance of the contract in question as he recognised that specific performance of a contract by a bankrupt to buy a property is not ordinarily granted against the trustee in bankruptcy of a vendee without his consent (See *Halloway v. York*, (2) ; Fry on Specific Performance, 6th Ed. pp. 446-447 ; see however *Ex parte Rabbidge*, (3) ; *Pearce v. Bastable* (4) ; as to the position of a trustee in a bankruptcy of a vendor.) Further Creet who had treated the contract as at an end could not in any event claim specific performance. Bearing the above observations in mind, it is impossible to escape from the conclusion that reasonable time for performance of the contract in question in this case had long elapsed long before the date of the compulsory liquidation of Jamals. The contract, therefore, was at an end and the liquidator could not take advantage of it. But assuming that the contract was subsisting on the 30th June 1926, it is common ground and manifest that the liquidator did not take any steps whatsoever to perform the contract or even to offer to perform the contract within a reasonable time thereafter or at all. Therefore, so far as Jamals and their liquidator were concerned, the contract had been abandoned and was at an end and no question of the specific performance of the contract could possibly arise. What then was the position of Currimbhoy in the events which had happened? On the date when Currimbhoy were added as parties defendants to this suit, they had not obtained any title from the liquidator of Jamals. The only document of title which Currimbhoy obtained from the liquidator was on the 25th January 1928 which is marked Exhibit K (See Volume I, Part II, page 399). There is in this document no reference whatsoever to the contract between Creet and Jamals in December 1923 ; and as I read the document it is insufficient, in my opinion, to confer any title upon Currimbhoy upon which they could rest for the purpose of enforcing any rights whatsoever under the contract of 1923 against Creet. The ultimate position, therefore, is that at no time there was any privity of contract between Creet and Currimbhoy and Currimbhoy's position could not in any way be bettered, and was not

(1) (1841) 8 M. & W. 321 ; 38 R. R. 713.

(2) (1877) 25 W. R. (Eng) 627.

(3) (1878) 8 Ch. D. 367.

(4) (1901) 2 Ch. 122.

bettered in fact or in law, by the conveyance from the liquidator dated the 25th January 1928. The claim, therefore, on the part of Currimbhoys for specific performance of the contract must fail.

Specific performance of the contract in question at the instance either of the plaintiff or of Currimbhoys being therefore out of the way, the next important matter for consideration is with regard to the plaintiff's claim for damages, and whether Currimbhoys had taken possession of the property and, if so, on and from what date. Incidentally, the question has to be faced as to what was the effect of Currimbhoys being added as defendants to this suit on the 28th July 1927 *vis à vis* the plaintiff. Mr. Pugh has contended before us that on the documentary evidence in this case the conclusion is irresistible that Currimbhoys had taken possession of the property in suit from September 1922, and had since then been in possession, and he laid special stress in this connection on the contents of the application made by Currimbhoys before the learned Subordinate Judge on the 21st August 1926 to be added as defendants. Mr. Pugh further contended that the addition of Currimbhoys as defendants to this suit was made under Order XXII rule 10 Civil Procedure Code, and that the moment Currimbhoys were added as defendants to this suit, they adopted everything what had previously been done in this suit and undertook to make themselves responsible for what ultimately happened in this suit; in other words, Mr. Pugh's contention was that Currimbhoys agreed to abide by the result of this suit and made themselves liable for all the damages which the plaintiff Creet had sustained in the events which had happened. On the other hand, the learned Advocate-General, apprehending that our conclusion might be to the effect that there was no privity of contract between Creet and Currimbhoys and that the claim made by Currimbhoys for specific performance of the contract in question might have to be negatived, argued that the documents showed that although on paper Jamals were representing that from September 1922 they were holding possession of the property in suit as Managing Agents on behalf of Currimbhoys there was as a matter of fact no legal transfer of title of any sort in favour of Currimbhoys till the 25th January 1928 when the liquidator transferred to Currimbhoys such right, title and interest of Jamals (if any) as was then subsisting and that the possession (such as it was) of Currimbhoys prior to the 7th May 1926, assuming that it amounted to what is called equitable possession, should not be seized upon for the purpose of fasten-

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ing on them a liability for damages. The learned Advocate-General further reiterated his contention that in order to succeed in a claim for Khas possession and damages the plaintiff Creet had to show that he had acquired title, and that it was quite clear on the documentary evidence that he had failed to show such title. He further contended that the claim in ejectment i. e., for Khas possession must fail because it was clear that at any rate from the 25th November 1924 Currimbhoy had been co-sharers of the plaintiff in this property, and, if that was so, the claim for damages for the period subsequent to the 25th November 1924 must also equally fail. The learned Advocate-General clinched his argument by saying that the only possible claim that could come up for real consideration and necessary adjudication in this case was for damages for a period of three years prior to the date when Currimbhoy were added as defendants to this suit, namely, the 28th July 1927; and that even so, from such period would have to be deducted the period between the 25th November 1924 and the 28th July 1927, in other words, the learned Advocate-General pointed out that the only period for practical consideration in this case in respect of the claim for damages in the events which had happened was the period between the 28th July 1923 and the 25th November 1924.

The questions thus raised require treatment from a broad point of view and cannot, in my opinion, satisfactorily be disposed of on a mere consideration from a technical point of view of the effect of the addition of Currimbhoy as defendants to this suit on the 28th July, 1927. I will therefore attempt to state and define the position of Currimbhoy from at any rate, the 25th November 1924, and in doing so I will first of all look at the question from the point of view that Currimbhoy might be regarded as trespassers when they first obtained possession, and consider the question as to whether Creet was entitled to maintain an action in ejectment in the events which had happened against Currimbhoy.

Now, what is trespass to land? Trespass is a wrong to another's possession; it is an injury to a possessory right and therefore the proper plaintiff in an action for trespass to land is the person who is in actual or constructive possession of the land i. e., entitled to immediate possession. The gist of the action of trespass must be and is the wrong to the right of the plaintiff's possession. The right to possession is all important in an action for trespass; and a mere right of property without a right to possession is not sufficient to support the action. Right to possession is one of the constituent elements of the complete right of property; and it has

been laid down from very old times that a person with a right to possession can always maintain an action of trespass against a wrong-doer. So also in the case of a person in actual possession. Such a person has against a mere stranger or wrong-doer the same remedies as if he had the right to possession and he can as against the stranger maintain trespass and in general the stranger who violates his possession cannot justify the violation by showing that the possession was without title or even by showing that it was wrongful, unless he further proves not only that a third person was entitled to the possession but that he, the stranger, had acted with the authority of the said third person (See Pollock & Wright on Possession in the Common Law pp. 145-147). The fact of possession in the sense referred to above therefore is *prima facie* evidence of title, and is alone sufficient to sustain the plaintiff's case against a mere wrong-doer (See Bullen & Leake, 3rd Ed. pp. 801-802 ; see also Dicey on Parties p. 333 *et seq.*). If therefore Creet had actual possession or had a right to immediate possession, in other words if Creet can prove a possessory title, he must be held to be entitled to maintain an action of trespass against all persons who trespassed on the property in question. Now so far as I can make out from the voluminous record before us, there can be no doubt that Creet had a sufficient possessory title to Karabagan, where the colliery in question is situate. He had an undisputed title to possession of the major portion of Karabagan, which is included in the Bajcapti lands. I do not think it is necessary or incumbent on me, having regard to the course which the argument before us has taken, to go in detail, through the various leases, surface and under-ground, of the Bajcapti lands for the purpose of demonstrating that Creet had acquired what is called a possessory title to the major portion of the Bajcapti lands. And indeed I am relieved of the necessity, because the learned Advocate-General, in answer to a specific question on this point, did not dispute this fact but his point was that at the time when Jamals went into possession, he had only acquired the surface rights in respect of a very small area. The question then resolves into this—whether Creet, as a co-sharer in respect of the Bajcapti lands, with which we are concerned, was entitled to maintain an action of trespass against the trespassers, i. e., Currimbhoy. On principle I do not see why a co-sharer cannot by himself maintain an action of trespass against a wrong-doer. The early English cases are not against this view ; indeed they support this proposition but it is sufficient for me to observe that this question has recently been the subject

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of debate and decision in Madras and in Bombay. In the case of *Syed Ahmed Sahib Shutari v. The Magnesite Syndicate, Limited* (1), it was held by Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastri that one of several co-owners can maintain an action in ejectment against a trespasser without joining the other co-owners as parties to the action. Again in *Maganlal v. Budhar* (2), it was held by Mr. Justice Shah and Mr. Justice Fawcett that the rule laid down in the last mentioned case should be followed. They observed as follows: "The reason of the rule which requires one fresh and common volition of co-owners to put an end to that which commenced under their common volition, does not apply to a case where what commenced under a common volition has come to an end and where the person concerned requires a fresh common volition to continue in possession. The case of a person, who is a tenant on sufferance, is akin to the case of a trespasser. It has been held in the case of *Shutari v. Magnesite Syndicate Ltd.* (1), that one co-owner can maintain an action to eject a trespasser who has been holding over wrongfully." I do not wish to burden this judgment with a discussion of the earlier authorities to be found in the reports in India, but reference may be made by the curious investigator into this branch of the law to the cases *Mohtakeshce Debes v. Oomabutty* (3); *Alum Monjes v. Ashad Ali* (4); *Hulodkur v. Gooroo Doss* (5); *K. P. Kannu Pishareddy v. V. M. Narayanan* (6); *Balkrishna v. The Municipality of Mahad* (7); *Radha Proshad v. Esuf* (8); *Dakhyani v. Mono Raut* (9); *Balkrishna v. Moro* (10); *Harendra v. Moran* (11); *Kabil v. Chunder* (12); *Sri Thakurji v. Hiralal* (13); *Secretary of State for India v. Girjabai* (14), and *Kamal Kumari v. Kiran* (15). If what I have stated is the law, it is difficult to see why. Creet was not entitled to maintain an action in ejectment against Currimbhoy whom I have taken to be trespassers for the purposes of this argument. In my view, Creet was entitled to maintain such an action.

(1) (1915) I. L. R. 39 Mad. 501.

(2) (1926) I. L. R. 51 Bom. 149.

(3) (1870) 14 W. R. 31.

(4) (1873) 20 W. R. 126.

(5) (1885) I. L. R. 10 Bom. 32.

(6) (1913) 19 C. W. N. 407.

(7) (1887) I. L. R. 15 Cal. 40.

(8) (1922) I. L. R. 44 All. 634.

(9) (1898) 2 C. W. N. 229.

(4) (1871) 16 W. R. 138.

(6) (1881) I. L. R. 3 Mad. 234.

(8) (1881) I. L. R. 7 Cal. 414.

(10) (1896) I. L. R. 21 Bom. 154.

(12) (1892) I. L. R. 20 Cal. 590.

(14) (1924) I. L. R. 49 Bom. 126.

The next important question is this—if Currimbhoys were trespassers, did they cease to be trespassers on the 25th November 1924 when they obtained a conveyance of Jyotish Sircar's interest in the Bajeapti lands which as stated above included Karabagan? The document referred to is a conveyance by Satish Chandra Sircar, Jyotish Chandra Sircar and Srish Chandra Sircar (Sons of Protap Chandra Sircar deceased),—Samarendra Nath Sircar, Arabindra Nath Sircar and Tripurendra Nath Sircar (sons of Rash Behari Sircar deceased) to Currimbhoys of their interest in 100 Bighas of Bajeapti and Khas Khalasi lands in Mouzah Khandra, surface and under-ground the lands being particularly described in the schedules thereto. This conveyance is Exhibit 16 and is on page 305 of Volume I Part II of the paper-book. As regards the right of the co-owners of mining properties to convey without reference to the other co-owners there seems to be no doubt that they have such right. [See *Bentley v. Bates* (1)]. The position, therefore, was that on and after the 25th November 1924 Currimbhoys had become co-sharers of Creet. No question therefore could arise from and after the 25th November 1924 as regards the right of Currimbhoys to remain on the land and work the mines in Karabagan. Thus there is an end to Creet's claim for ejectment and with it there must necessarily fail his claim for damages for the period subsequent to the 25th November 1924. It is settled law that each co-owner is entitled to work the mines provided he does not take more than his share of the minerals nor work the same wastefully. A person who is a co-owner of a mine with another or others, whether as joint tenant, tenant in common or co-parcener, can enter upon and work the mine, or license another person to do so, subject only to the restriction that he shall not take more than his share. See Cockburn on the Law of Coal and other Minerals p. 82; *Job v. Potton* (2); *Wilkinson v. Haggart* (3); *Glyn v. Howell* (4); *Denys v. Shuckburgh* (5); *Mahesh v. Nombat* (6) and *Chandra Kishore Chakravarty v. Bissessar Pal* (7). This being the true position in law, and Creet having never expressed the desire or taken any steps to work the mines himself unless Creet is in a position to show that Currimbhoys have taken more than their share of the

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(1) (1840) 4 Y. & C. Ex. 182.

(2) (1875) L. R. 20 Eq. 84.

(3) (1847) 12 Q. B. 837.

(4) (1909) 1 Ch. 666 (667).

(5) (1840) 4 Y. & C. Ex. 42.

(6) (1905) I. L. R. 32 Calc. 837; 1 C. L. J. 437.

(7) (1927) I. L. R. 55 Calc. 396.

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minerals he can claim nothing from them or against them after the 25th November 1924. But we are not concerned with such a claim. The present suit is not a suit for partition or for an account against Currimbhoy nor has the present suit been conducted on such a footing. If Creet had or has any rights against Currimbhoy in respect of the period commencing on the 25th November 1924, his rights will in no way be prejudiced by reason of this judgment.

I have just said that Creet's claim for recovery of khas possession must fail and with it also his claim for damages for the period subsequent to the 25th November 1924. In order that there may not be any misunderstanding I desire to make it plain that my observations relating to the failure of Creet to recover khas possession apply only, and are limited, to the property, surface and under-ground, which is covered by the conveyance of the 25th November, 1924 (Exhibit 16). In respect of all areas, surface and under-ground, other than the subject matter of the said conveyance, the plaintiff Creet will be entitled to recover khas possession. I understand that there have been no raisings of coal from under-ground except in Karabagan and that no profit can be obtained otherwise from the lands in suit. If that is so, as indicated above, the claim for damages for the period subsequent to the 25th November 1924 fails.

Mr. Pugh, however, has argued that Currimbhoy went into possession on the 13th September 1922 and that it is not a fact that they went into possession at a later stage namely on the 7th May 1926 as alleged by them in their application to be added as defendants to this suit. According to Mr. Pugh, in the events which had happened, Section 116 of the Indian Evidence Act came into play and the appellants cannot be allowed to raise any objection to the title of Creet. Further, in the circumstances, Mr. Pugh contended that Currimbhoy having come into this suit must be taken to have agreed to abide by the result of the suit, and must be held responsible in damages during the period of their possession, at any rate, upto the 25th November, 1924.

It may be convenient to dispose of the last point at once. Mr. Pugh's contention is that the addition of Currimbhoy as defendants to this suit on the 28th July 1927 was made under the powers conferred on the Court by Order XXII rule 10 Civil Procedure Code and that so far as Currimbhoy are concerned the suit in which they were added as defendants was and is no new suit at all. In support of this contention Mr. Pugh

relied on the case of *Chunni Lal v. Abdul AH*, (1). He also relied on the cases of *Chorlton v. Dickie* (2), and *Barneman v. Wilson* (3). First of all we must ascertain whether the addition of Currimbhoys as defendants to this suit was made under Order XXII rule 10 Civil Procedure Code. As will have been gathered from what has been stated above on the date on which Currimbhoys were added as defendants to this suit they had not obtained any assignment whatsoever of any sort from the liquidator of Jamals; in other words, there had not been any assignment, creation or devolution of any interest in favour of Currimbhoys upto the date of their addition as defendants and it is to be borne in mind that before Jamals went into liquidation there had been no assignment, creation or devolution of any interest in favour of Currimbhoys. Further, in the events which had happened i. e., the contract of December 1923 having been abandoned and being at an end there was nothing in respect of which there could be an assignment, creation or devolution of any interest in favour of Currimbhoys. I am, therefore, of opinion that the addition of Currimbhoys as defendants to this suit was not made and could not have been duly made under Order XXII, rule 10 Civil Procedure Code. See in this connection *Maharaja Sir Manindra Chandra Nundy v. Ram Kumar Lal Bhagat* (4). As regards the two cases in England cited by Mr. Pugh, *Chorlton v. Dickie* (2) affords no assistance. In the case of *Barneman v. Wilson* (3), an interlocutory order for injunction and Receiver having been made against the defendants in an action they gave notice of appeal and shortly afterwards became bankrupt. An order was made for carrying on the proceedings against their trustee. The trustee gave notice to the plaintiff that he should not proceed with the appeal. Shortly after this the trustee entered an appearance and called for the statement of the case. He declined to pay the costs of the appeal incurred by the plaintiff before the notice that the appeal would not be proceeded with and the question for decision was as to the costs which had been incurred. It was held that the appeal must be dismissed with costs to be paid by the trustee, for, having adopted the defence of the bankrupts he had placed himself in their place as to the whole of the action and could not reject part of the proceedings in it. As I read the

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(1) (1901) I. L. R. 23 All. 331 (335) (2) (1879) 13 Ch. D. 160.

(3) (1884) 28 Ch. D. 53.

(4) (1922) L. R. 49 I. A. 220; 35 C. L. J. 542.

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case of *Borneman v. Wilson* (1) it does not carry Mr. Pugh home having regard to the special facts of the present case. I am inclined to the view that the addition of Currimbhoy as defendants to this suit was made under the provisions of Order I rule 10 Civil Procedure Code and, if that is so, the proceedings in this suit must be taken to have commenced as against Currimbhoy on the date when they were so added as defendants namely, the 28th July 1927.

As indicated above Currimbhoy have admitted that they went into possession of the colliery on the 7th May 1926; but since that date for the reasons given above (i. e. Currimbhoy having become co-sharers of Creet in Karabagan), no relief against Currimbhoy can be given in favour of Creet. I have also considered whether Creet is entitled to any relief against Currimbhoy for the period between the 25th November 1924 and the 7th May 1926. I have proceeded on the assumption that Currimbhoy were in possession of Karabagan between those two dates and for the same reasons I have been obliged to negative Creet's claims to any relief in this suit against Currimbhoy in respect of the period between those two dates.

I have now got to consider whether Currimbhoy were in possession of Karabagan between the 13th September 1922 and the 25th November 1924. I have set out in an earlier portion of this judgment the references to the material documents bearing on the question of Currimbhoy's possession of Karabagan within which is the disputed colliery, and I will not again refer to these documents. Towards the close of the argument before us, there arose an acute controversy between the parties as to whether Currimbhoy had gone into possession before the 7th May 1926. Mr. Pugh on behalf of the plaintiff Creet drew pointed attention to the statements contained in Currimbhoy's application to the Court to be added as defendants, to the statements made by them in their written statement, to the correspondence between Jamals and Currimbhoy and also between Morgan & Co. and Currimbhoy, to the entries in Jamals' books, and to the payments made from time to time in respect of the said colliery by Currimbhoy, and he argued that on this body of evidence the conclusion was irresistible that Currimbhoy were in possession before the 7th May 1926. On the other hand the learned Advocate-General, without in any way abandoning the contentions advanced by him when he opened this appeal before us, contended that the true conclusion

(1) (1884) 26 Ch. D. 53.

on the facts was that there was merely an agreement between Jamals and Currimbhoys as regards the acquisition by Currimbhoys of this colliery, that Currimbhoys were not in possession as is proved by the renewal of the promissory notes for Rs. 4, 00,000 from time to time and by the claim put forward by Currimbhoys before the liquidator of Jamals.

The problem is not an easy one to solve and our difficulties have mainly arisen because of the conflicting statements made from time to time by Currimbhoys; but on the best consideration that I have been able to bestow on this matter both while the argument was in progress and afterwards, I am clearly of opinion on the documentary evidence adduced in this case, and not disregarding entirely the oral evidence, that Currimbhoys were in possession of the disputed colliery from September 1922. In the view which I have taken, it is not necessary for me to consider the application of section 116 of the Evidence Act on the facts of this case.

For what period then prior to the 25th November 1924, must Currimbhoys now pay damages? As has been stated above, Currimbhoys were added as defendants on the 28th July 1927 and therefore the suit must be taken to have been commenced against them on that date. The plaintiff Creet therefore is entitled to recover damages against Currimbhoys for a period of three years prior to the date of the commencement of the suit against Currimbhoys i. e., for the period between the 28th July 1924 and the 28th July 1927. But for the reasons given above the period between the 25th November 1924 and the 28th July 1927 cannot be taken into account. There therefore remains the period between the 28th July 1924 and the 25th November 1924 during which the damages sustained by Creet have to be ascertained for the purposes of this suit.

Mr. Pugh referred to the case of *Laird v. Pim* (1), and contended that the measure of damages should be that which was adopted in that case. Now, if the contract had been a subsisting one and if Jamals or their liquidator had appealed, we should have had to consider the question raised in *Laird v. Pim* (1). In that case a party had been let into possession of lands under a contract of purchase, but did not complete the purchase and refused to pay the purchase money and no conveyance was executed. It appeared that after the vendees had been let into possession, they had taken from the land and sold a quantity of brick clay. Baron Parke

(1) (1841) 7 M. & W. 474; 151 E. R. 852.

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held that the measure of damages in such a case was the injury sustained by the plaintiff by reason of the defendants not having performed their contract and the question was how much worse off was the plaintiff by the diminution in the value of the land, or the loss of the purchase money in consequence of the non-performance of the contract. It was held that the defendants were liable to pay the interest on the purchase money up to the commencement of the action and the value of the clay taken away. It is apparent therefore that the position in the present suit so far as Currimbhoy is concerned is far away from *Laird v. Pim* (1), for there was no privity of contract between them and Creet.

The measure of damages in a case like this is the fair market value of the coal (be it remembered that Creet was a part owner of the coal) at the pit mouth at the time when it was severed subject to just allowances. As to what allowances there shall be depends on the conduct of the parties and the other circumstances of the case. There are two rules—(1) the harsher, under which only the cost of bringing the coal to bank is allowed and (2) the milder under which the expense of hewage and haulage i. e., the cost of working and severing as well as of bringing to bank is allowed. The harsher rule, only allowing the expense of bringing to bank, has been applied where the misconduct has been of a substantial character; e. g. where the wrongful working has been wilful and fraudulent; see *Martin v. Porter* (2); *Morgan v. Powell* (3); also see Lord Macnaghten's remarks in *Peruvian Guano Co. v. Dreyfus* (4), or the workings have been continued by a person in possession after it was known that a lease would not be granted, and that he had no title and had no right to expect a title. See *Trotter v. Maclean* (5). So, also where the working has been unauthorised and without mitigating circumstances [see *Wild v. Holt* (6)], wholly unauthorized and unlawful; [see *Llynvi Coal Co. v. Brogden* (7)], the decree herein it may be noted is the model form; fraudulently concealed, or continued after negotiations for purchase had fallen through [see *Phillips v. Homfray* (8)]; negligent, and notwithstanding that the employers relied on their certificated manager, and had no personal knowledge or notice of

(1) (1841) 7 M. & W. 474; 151 E. R. 852.

(2) (1839) 5 M. & W. 351; 2 H. & H. 70.

(3) (1842) 11 L. J. Q. B. 263; 3 Q. B. D. 278.

(4) (1894) A. C. 175. (5) (1879) 13 Ch. D. 574; 49 L. J. Ch. 236.

(6) (1842) 9 M. & W. 672.

(7) (1870) L. R. 11 Eq. 188; 40 L. J. Ch. 46. (8) (1871) 6 Ch. 776.

the wrongful working [see *Joiner v. Dickinson* (1)] ; malicious, and with full knowledge that wrong is being done [see *Per curiam Livingstone v. Rawyards Coal Co.* (2)] ; furtive and in bad faith. The reason why allowances are made in favour of an innocent mistaken trespasser and disallowed as against a wilful and intentional trespasser, is because the latter must not 'qualify' his own wrong. (See *Per Lord Blackburn*, ib). But the milder rule, allowing the deduction of the expense of working and severing the coal as well as of bringing it to bank, will be applied where the wrongful working has not been done with a guilty or negligent mind, or sinister intention : e. g., where the wrongful working has been done without fraud or negligence, but fairly and honestly [see *Wood v. Morswood* (3)] ; inadvertently and under a bona fide belief of title [see *Hilton v. Woods* (4)] [as that a lease which had in fact expired was still continuing, see *Jagon v. Vivian* (5)] ; without the express authority, though with the knowledge of the rightful owner, see *Ashton v. Stock* (6) ; under a mere mistake and without any suggestion of fraud, see *Re United Merthyr Colliery Co.* (7) ; neither tortious, nor larcenous, nor negligent, but in the assertion of a right, see *Job v. Potton* (8). So, if the workings were continued on the fair expectation that a lease would be granted [see *Trotter v. Maclean* (9)], or have been innocent, and in ignorance, and with as little negligence or carelessness as possible, and in the belief that it belonged to the trespasser, see *Livingstone v. Rawyards Coal Co.* (2).

I will not now discuss the evidence showing how and under what circumstances Currimbhoys got into possession of the colliery in suit, but if ever there was a case where the milder rule ought as a matter of justice to be applied it is this case and I am of opinion that Currimbhoys should be allowed as against the price of coal raised from the 28th July 1924 to the 24th November 1924 the cost of working and severing as well as of bringing the coal to bank.

(1) (1881) 45 L. T. N. S. 643.

(2) (1880) 5 App. Cas. 25 ; 42 L. T. 334 (336, 337).

(3) (1841) 3 Q. B. 440.

(4) (1867) L. R. 4 Eq. 432 ; 36 L. J. Ch. 941.

(5) (1871) 6 Ch. App. 742 ; 40 L. J. Ch. 389.

(6) (1877) 6 Ch. D. 719.

(7) (1872) L. R. 13 Eq. 46.

(8) (1875) L. R. 10 Eq. 84 ; 44 L. J. Ch. 262.

(9) (1879) 13 Ch. D. 574 ; 49 L. J. Ch. 256.

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The result, therefore, is that in my opinion the decree against Jamals must stand ; as against Currimbhoy's there can be no decree for Khas possession of the lands covered by the conveyance from the Sarkars in their favour dated the 25th November 1914 ; in respect of all other lands surface and under-ground, Creet is entitled to Khas possession ; as against Currimbhoy's the decree for damages made by the learned Subordinate Judge must be discharged ; there will be a declaration that Creet is entitled to recover damages to the extent of his share in the lands at Karabagan during the period from the 28th July 1924 to the 25th November, 1924 that such damages must be calculated on the following basis, namely, from the price of the coal raised during the period from the 28th July 1924 to the 25th November 1924, Currimbhoy's would be entitled to deduct the cost of working and severing as well as of bringing to bank.

On the evidence adduced in this case, documentary and oral, I find that during the period last mentioned 5500 tons of coal were raised and the price thereof taking Rs. 11 per ton as an average amounted to Rs. 60,500 and that the cost of working and severing as well as of bringing to bank the said quantity of coal amounted to Rs. 8937. The net balance due in respect of the said quantity of coal is Rs. 51,563 but Creet would not be entitled to the entirety of the last mentioned sum ; he would be entitled to the extent of his share in Karabagan. Creet however would be entitled to interest on the amount payable to him at 6 per cent. from the 28th July 1924 down to the date of realisation.

Unless the parties agree among themselves as to this there will be a remand to the Court below to find out the extent of Creet's share and to calculate the amount payable to Creet by Currimbhoy's accordingly.

So far as I can make out the ultimate sum payable to Creet will be a substantial amount ; as this has been a divided success, there will be no costs in this Court. The order made by the Court below as regards costs will stand.

Page, J :—I agree.

A. T. M.

Decree against Jamal confirmed : Decree against appellant for damages discharged and in its place, decree for certain amount substituted : Decree in case of plaintiff varied.

FULL BENCH.

*Before Sir George Claus Rankin, Knight, Chief Justice,
Mr Justice C. C. Ghose, Mr. Justice B. B. Ghose,
Mr. Justice M. N. Mukerji, and
Mr. Justice D. N. Mitter.*

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Succession certificate—Succession Certificate Act (XXXIX of 1925), Secs. 214, 373—Certificate, when granted—Debt due to the deceased—Character and reality of the debt—Compensation money deposited under section 31(2) of the Land Acquisition Act (I of 1894)—Succession Certificate Act, Sec. 214, construction of—Civill Procedure Code (Act V of 1908), Sec. 115.

In granting succession certificate the District Judge should be satisfied not that a succession certificate will be necessary or eligible under section 214 of the Indian Succession Act or otherwise but that there is "ground for entertaining the application"; that is to say, that it is a serious and sensible application by a person who desires to make a claim in the representative character which he seeks. Clauses 2 and 3 of section 214 of the Indian Succession Act contemplate that the Judge should endeavour to determine whether the applicant is the proper person or a proper person to be clothed with a representative character and any intricate questions of fact or law bearing upon this question may be solved in a summary manner.

It is not the law that the Court upon an application for a certificate has to decide for itself, as a condition of granting the certificate, that the case is one in which the debt was due to the deceased person within the meaning of section 214 of the Indian Succession Act. A reasonable and sensible claim to be enabled to proceed against a third party as being a debtor of a deceased person is sufficient for the purpose of clothing the Court with jurisdiction under section 373 of the said Act and may be regarded as ground for entertaining the application: *Bhugobutty v. Bhelanath* (1) approved.

A succession certificate enables the grantee to prosecute a claim as a representative of the deceased with greater advantage than he would have been able to do in the absence of this representative right.

The issue of a succession certificate may be justified without the Court arriving at a conclusion to the effect that such a certificate is a necessary

* Full Bench Reference No. 1 of 1929 in Civil Revision Cases Nos. 150 to 152 of 1929, against the decisions of J. M. Pringle Esq, District Judge of 24-Pergannas, dated the 5th January, 1929, affirming those of Babu Debarata Mukherjee, 1st Subordinate Judge, of Alipore, dated the 5th October, 1928.

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condition without which the claim could not succeed, or that the debts were due to the deceased.

Section 214 of the Indian Succession Act being a restrictive section, should be carefully and accurately construed: *Abinas v. Prabodh* (1) commented on.

A certain property was acquired under the Land Acquisition Act after the death of the owner when it was in the hands of his widow. The compensation money was kept in deposit in the Land Acquisition Collector's office under section 31(2) of the Land Acquisition Act. After the death of the widow, three sons of one of two daughters of the owner petitioned the Land Acquisition Judge for payment to them of their share of the money. They were directed to obtain succession certificate for the withdrawal of the amount. They then applied to the Subordinate Judge for succession certificate with reference to the share due to each in the compensation money. The son of the other daughter contended that the certificate could not be granted as the compensation money, if it were a debt, was not a debt due to the deceased. The applications were granted both by the primary Court and by the appellate Court. On revision:

Held, by the Full Bench, that the case was not one which could be interfered with under section 115 of the Civil Procedure Code, as the Subordinate Judge had jurisdiction to make the order.

That the opposition of the objector was a misguided one.

That if the Judge thought that the order of the Land Acquisition Court was ground for entertaining the applications for certificates, he would be entirely within his rights: *Radha Rani v. Brindaban* (2) overruled.

That the Subordinate Judge was not obliged in the presence of these parties, and in the absence of the person or authority from whom the money was claimed, to decide the question as to the character and reality of the claim.

That the objector in the present case was in no way damaged by the grant of the certificate. If the compensation money was not a debt due to the deceased, no Succession Act could operate as giving title to the money. Before the Land Acquisition Judge a succession certificate would in no way prevent the objector from contending that the compensation money was not a debt due to the deceased and from putting forward his own title thereto.

Application for Revision under section 115 of the Civil Procedure Code.

The facts may be stated in brief thus:—

Rai Bankim Chandra Chatterjee Bahadur, C. I. E. died in 1894 leaving him surviving a widow Srimati Rajlakhmi Debi and two daughters Srimati Sarat Kumari Debi (the mother of the petitioner Brojendra Sunder) and Srimati Nilabja Kumari Debi (the mother of the three applicants opposite parties) and left considerable moveable and immoveable properties. He left a Will, but admittedly it was not in respect of his immove-

(1) (1911) 15 C. W. N. 1018.

(2) (1897) I. L. R. 25 Calc. 320.

able properties in Kantalpara. The widow obtained letters of administration with a copy of the Will annexed. Between 1906 and 1913 some land which formed part of the estate of Rai Bankim Chandra situated at Kantalpara was acquired under the Land Acquisition Act and the compensation money was kept in deposit under Section 31 (2) of the Land Acquisition Act as the widow either as administratrix or as the widow was not competent to alienate the properties. Srimati Nilabja Kumari Debi predeceased her mother. The widow died in 1919. After the death of Srimati Sarat Kumari Debi in 1927 the three surviving sons of the daughter Srimati Nilabja Kumari Debi and Brojendra Sunder Banerjee son of Srimati Sarat Kumari Debi succeeded to the estate left by late Bankim Chandra. The opposite parties herein severally applied to the Collector of Alipore for the withdrawal of the money deposited to the extent of their shares. The applications were opposed by the petitioner. The Collector refused to pay the amount without the production of succession certificate. Thereupon each of them applied to the Subordinate Judge for issue of certificate in respect of a fourth part of the deposit. The three applications were granted and the order for the issue of succession certificate was made. The petitioner appealed against the orders. The learned District Judge admits that the money for which the certificates have been applied for and granted is not strictly speaking a debt due to the deceased's estate but represents what was part of the deceased's estate in possession at the time of the deceased's death. But he is of opinion that under Section 372 of the Act he is not bound to enquire as to whether what has been stated in the application as debts is really a debt or not. No doubt if the application contains no mention of any debts whatsoever, the Judge could not grant a certificate but the mentioning of debts in the application would ordinarily be a sufficient ground to justify the grant of a certificate without investigating into the reality of the debts or whether they are debts or not.

The Rule came on for hearing before Suhrawardy and Jack, JJ. who made the following

Order of Reference.

These Rules are directed against the orders of the District Judge of 24-Parganas passed in Appeals in Succession Certificate Cases under the Indian Succession Act of 1925. There were three applications under that Act by the three opposite parties before us before the District Delegate. The petitioner opposed

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the grant of certificates to the applicants on the ground that the money for which the certificates were prayed for was not a debt and therefore no succession certificate ought to issue. Both the Courts below have agreed in granting the certificates and these rules were issued to consider the propriety of the orders.

The facts are that Rai Bankim Chandra Chatterjee Bahadur, C. I. E., died in 1894 leaving a widow, two daughters and certain immovable properties. He also left a Will of which the widow obtained letters of administration with a copy of the Will annexed. Between 1906 and 1913 some land which formed part of the estate of Rai Bankim Chandra was acquired under the Land Acquisition Act and the compensation money was kept in deposit under section 31(2) of the Land Acquisition Act, as the widow either as administratrix or as widow was incompetent to alienate the property. The widow died in 1919 and the sons of the daughters of Bankim Chandra have succeeded to his estate. The petitioner is the son of one daughter and the opposite party in the three cases are the sons of the other daughter. The opposite party then applied to the Collector for the withdrawal of the money deposited to the extent of their shares. The Collector refused to pay them the amount without their producing a succession certificate. Thereupon they applied to the District Judge for issue of certificates in respect of the amount in deposit in the Land Acquisition Office.

The learned District Judge admits that the money for which the certificates have been applied for is not strictly speaking a debt due to the deceased's estate but represents what was part of the deceased's estate in possession at the time of the deceased's death. But he is of opinion that under section 372 of the Act he is not to enquire as to whether what has been stated in the application as debt is really a debt or not. In other words if a person applies for a certificate naming a certain amount in his application as a debt due to the deceased, the Judge is not to look into the factum or genuineness of the debt. So far, the learned Judge is perfectly right. The Court which is asked to grant a succession certificate is not to determine the validity or even the existence of the debt any more than a probate Court is to determine the legal effect of the Will, as to whether it is valid or invalid in law. But the probate Court, if an application for probate is made before it, has to determine whether the document placed before it is a testamentary instrument of which probate is to issue. In the same way the certificate Court has

to determine whether the amount as set out in the application as a debt is really a debt within the meaning of section 214 of the Succession Act, for the matter goes to the very root of the jurisdiction of the Court.

The question therefore that now arises is whether the amount in deposit in the Land Acquisition Office is a "debt" within the meaning of section 214 of the Indian Succession Act, 1925. The learned Judge has held that it is so. And in support of his view he has relied upon a decision of the Court in *Abinas Chandra Paul v. Probodh Chandra Paul* (1). That decision undoubtedly supports the view taken by the learned Judge and we are therefore called upon to consider whether the point raised before us and which was raised in that case has been correctly decided. On a careful consideration of the matter we do not find ourselves in agreement with the decision in that case as it is not consistent with the view taken by a Full Bench of this Court in *Banchharam Majumdar v. Adyanath Bhattacharjee* (2) as to the meaning of the word "debt" as used in section 4 of Act VII of 1889 which is reproduced in section 214 of the Act of 1925. In *Banchharam Majumdar's* case (2) the debt was due to the deceased but became payable after his death. The question which the Full Bench was called upon to consider was whether it was a "debt" within the meaning of section 4 of Act VII of 1889. In considering this question the Court determined as to what was the meaning of the word "debt" as used in that section, Jenkins, C. J., with whom Mookerjee, J., was in agreement defined "debt" as a sum of money which is now payable or will become payable in future by reason of present obligation. One of the requisites therefore of a debt is that it must arise from present obligation; it must be "*debitum in presenti*" though "*solvendum in futuro*." If the obligation was present during the life-time of the deceased but its realisation was postponed till after his death, it is a debt within the meaning of the law. If the debt must arise from present obligation, it is difficult to hold that a debt which comes into existence after the death of the deceased may still be called a debt due to him? In *Abinas Chandra Paul v. Probodh Chandra Paul*, (1) Mookerjee, J., though his judgment was a leading judgment in the Full Bench case, does not refer to the definition of "debt" as given by it but holds it distinguishable. In *Abinas Chandra's* case (1) Mr. Justice Mookerjee felt the difficulty and

(1) (1911) 15 C. W. N. 1018.

(2) (1909) I. L. R. 36 Cal. 936; 10 C. L. J. 180.

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said "if the expression used by the Legislature in section 4 of the Act, namely, the "debtor of a deceased person" be strictly construed the view may well be maintained that succession certificate cannot be granted in respect of either of the sums (compensation money awarded for acquisition of land after the death of the owner and a sum payable as arrears of rent from the tenants of certain premises comprised in the estate of the deceased). We are not prepared, however, to place a narrow and restricted construction upon the provisions of the Succession Certificate Act." As has been held in *Annapurna Dasi v. Nalini Mohan Das*, (1) liberal construction should be put upon the word "debt" as used in the Succession Certificate Act. But the word cannot be so liberally construed as to introduce something which cannot by any stretch of language be included in it. The utmost stretch to the meaning of the word was given in *Annapurna Dasi's* case (1) where it was considered as including part of a debt. The argument adopted by Mookerjee J., in *Abinas Chandra Paul's* case (2) does not seem to touch the matter in question. He argues that the life-estate in the possession of the widow may be considered as non-existent and when succession opens out after her death the reversionary heir took the estate as if the life-estate had not intervened. That may be so but how does this render the compensation money in respect of the property acquired long after the death of the deceased a debt due to the deceased? The learned Judge feels the anomaly of the position but is of opinion that the language as used by the Legislature in section 4 of the Act does not require to be unduly strained if it is held that succession certificate may be granted in respect of such compensation money as debt due to the deceased or at least *to the estate of deceased*. In our judgment it will be putting upon the word used by the Legislature a meaning which it is not capable of bearing.

In *Abinas Chandra Paul's* case (2) the learned Judges stated that their view was supported by the decision in *Bishnoo Dass v. Mungul Dass* (3). That was a decision under Act XXVII of 1860, the preamble of which shows that it was intended for recovery of debts which are payable in respect of the estate of a deceased person, and the sections 2, 4 and 5 of that Act explained the nature of the debts. The learned Judge (Ramesh Chunder Mitter, J.) said that only in cases where it was shown

(1) 1914) I. L. R. 42 Calc. 10.

(2) (1911) 15 C. W. N. 1018.

(3) (1875) 24 W. R. 203.

that the deceased person at the time of his death had certain debts owing to him or in other words that there were persons who could be called debtors of the deceased in those cases only certificate under Act XXVII of 1860 would be granted. Having so decided the learned Judge held that in no sense of the term would a tenant from whom rent became due after the death of the owner be called a debtor of the owner of the property. That case as we understand it does not help the view taken by Mr. Justice Mookerjee in *Abinas Chandra Paul's* case (1) and is apparently opposed to it. Reference has also been made to *In Re : Mussamut Tripoora Soonudree* (2). In that case the estate was, subsequent to the death of the owner, sold for arrears of revenue and the amount of the surplus sale proceeds was left in the hands of the Collector, who demanded a succession certificate under Act XXVII of 1860 before he made over the amount to the widow of the deceased. The widow applied for certificate under the Act but her application was refused by the District Judge on the ground that the sum in deposit was not in any sense a debt due to the deceased at the time of his death. No one appeared on behalf of the respondent in that case. In a very short judgment Kemp. J., said that the sale proceeds although they might have been recovered after the death of the owner were clearly payable to his estate and the widow might be granted a certificate to recover it. That *ex parte* decision may be defended on the wording of Act XXVII of 1860 but cannot be treated as an authority in cases arising under Act VII of 1889 or Act XXXIX of 1925.

On the analogy of the decision in *Abinas Chandra Paul's* case (1) rent falling annually due for non-agricultural land from tenants of the estate of the deceased in his widow's possession after his death cannot be recovered except by succession certificate, for rent due in respect of the estate of the deceased after his death is as much debt due to the deceased's estate as compensation money for land acquired after his death, and the widow is not entitled to recover any rent from the tenant without each time applying for succession certificate for the sale. We do not think that this position can be maintained, though in *Abinas's* case (1) the learned Judges were of opinion that a certificate under the Succession Act should also be obtained for the rent due to the estate of the deceased during the lifetime of the widow. See *Ranchordas v. Bhagubhai* (3).

(1) (1911) 15 C. W. N. 1018.

(2) (1874) 22 W. R. 45

(3) (1893) I. L. R. 18 Bom. 394.

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Reference in this connection may be made to the case of *Umesh Chandra Pramanik v. Motkura Mohan Haldar* (1). There the claim was under section 68 of the Transfer of Property Act for money which had become due to the estate of the deceased mortgagee in the hands of his heir by reason of the mortgage security having been impaired on the happening of an event after the death of the mortgagee. It was held by the lower Court that the suit was not maintainable without a certificate under section 4 of the Succession Act. That view was overruled by this Court and it was observed: "If that was so, can it be said that the money for which this suit was brought was a debt due to the estate of the deceased mortgagee within the meaning of section 4, sub-section 1, clause A of the Succession Act? We are of opinion that the question must be answered in the negative. The case before us is not like a case in which the money was due to a deceased person upon the expiry of a certain time when it fell due. The case before us is one in which if the security had remained unimpaired the right to demand the money could never have accrued to the mortgagee or his legal representative and the right to obtain a personal decree against the mortgagors arose only upon the happening of the contingency which might never have happened." The learned Judges held that the amount in suit there was not a debt under section 4 of the Succession Act. The observations made there apply with equal force to the facts of the present case.

There is another way of looking at this question. As soon as a person dies his ownership of the property ceases and it becomes the property of his heirs subject to any life-estate though it does not actually vest in any individual until the termination of the life-estate. As soon as the life-estate ends and the widow dies, the reversioners then in being at once become entitled to the property left by the deceased. If the property were not acquired by the Land Acquisition Collector it would have devolved on the heirs of the deceased Bankim Chandra who were in existence at the time of the death of the widow. That property is now represented by the compensation money. It is not reasonable to hold that because the property which would otherwise have vested in the petitioner and other heirs has been converted into money the course of devolution will be impeded by section 214 of the Succession Act. Then again under section 32 of the Land Acquisition Act the money deposited under section 31 (a) shall

(1) (1901) I. L. R. 28 Calc. 246.

remain so deposited and vested as described in the section until it may be applied for by any person or persons becoming absolutely entitled to it. On the death of the widow, the petitioner and the opposite party became absolutely entitled to the money deposited in the Land Acquisition Office and the Collector under that section has to pay it to them. There is no indication in section 32 of the Land Acquisition Act that the person who has become entitled to the money has to secure a certificate to get it.

The question that we have been called upon to determine in this case is what is the meaning of the expression "debtor of a deceased person." The debt did not accrue until 20 years after the death of Bankim Chandra and the property acquired was in the hands of the widow subject to the reversionary right of the petitioner and others. In these circumstances can the Collector be called a debtor of the deceased Bankim Chandra? The answer in our opinion is in the negative. If the Collector by forced language may be called debtor of the estate of the deceased, the Act does not apply to debts due to the deceased's estate.

As we are unable to agree with the decision in *Abinas Chandra Paul v. Probodh Chandra Paul* (1) the only course left open to us is to refer the matter for decision by a Full Bench. We accordingly refer the following questions to the Full Bench :—

(1) If a property is acquired under the Land Acquisition Act after the death of the owner when it was in the hands of his widow or a person having a life-estate and the compensation money is kept in deposit in the Land Acquisition Collector's Office under the section 31 of the Land Acquisition Act, 1894, is such amount a debt within the meaning of section 214 of the Indian Succession Act, 1925, for which a certificate under Part X of that Act has to be obtained?

(2) Was the case of *Abinas Chandra Paul v. Probodh Chandra Paul*, (1) rightly decided?

As the question arises in the exercise of our revisional jurisdiction we refer the matter to a Full Bench under Chapter VII, rule 5 of the Rules of the High Court, Appellate Side, for such orders as to such Bench may seem fit.

Messrs. Sarat Chandra Roy Chowdhuri and Santi Kumar Roy Chowdhuri for the Applicant.

Messrs. Rupendra Kumar Mitter and Shyama Prasad Mukhopadhyaya for the Opposite Party in Nos. 150 and 151.

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Messrs. Someswar Prasad Mukherjee and Probash Chandra Bhose
for the Opposite Party in No. 152.

Mr. Sarat Chandra Roy Chowdhuri argued that the definition as was formulated by Romesh Chandra Mitter J. in *Bishnoo v. Mungul* (1) should be accepted as correct one. He based his argument on two points viz. (1) this is a case in which the Judge has no jurisdiction; (2) this money is not due to the deceased—this is not a debt of the deceased person and (3) the Judge had no jurisdiction under section 32, Land Acquisition Act.

Mr. Someswar Prasad Mukherjee argued:—"Debt due to the deceased" means debt due to the deceased's estate—whether accruing during or after the life time of the owner. Vide *Mussamut Tripoora Soondures* (2). The judgment of Hon'ble Mr. Justice Kemp in *Mussamut Tripoora Soondures* (2) though it is *ex parte*, is still a judgment in the proper sense of the term for it contains the considered views and opinions of a learned Judge. In the case of *Abinas Chandra Paul v. Probash Chandra Paul* (3) the learned Judge's remark in page 1019 is merely an *obiter dictum*. The decision as it stands supports the contention in the present case. The definition given in *Banckharam v. Adyanath* (4) is not exhaustive. It was decided whether in that particular case the money was a debt or not: *Annapurna v. Nalini Mohan* (5); *Ram Raj v. Brij Nath* (6); *Umesh v. Mothura* (7) and *Ranchordas v. Bhagubhai* (8) were referred to.

Mr. Rupendra Kumar Mitter argued whether section 115 Civil Procedure Code is applicable in this case. Further whether the intervention of one or more widows' estate takes it out of the purview of section 114 of Act 39 of 1925. He based his argument on the judgment of Hon'ble Mr. Justice Kemp in *Tripoora Soondures* (2) to support the grant of succession certificate.

C. A. V.

The following judgments were delivered:

Rankin, C. J.:—Rai Bankim Chandra Chatterjee Bahadur died in 1894 leaving a widow and two daughters. The first daughter had four sons and the second three sons. The widow and both daughters are now dead. In his Will no mention was made of

July, 29.

(1) (1875) 24 W. R. 203.

(2) (1874) 22 W. R. 45.

(3) (1911) 15 C. W. N. 1018.

(4) (1909) I. L. R. 36 Calc. 936; 10 C. L. J. 180

(5) (1914) I. L. R. 42 Calc. 10.

(6) (1913) I. L. R. 35 All. 470.

(7) (1901) I. L. R. 28 Calc. 246.

(8) (1893) I. L. R. 18 Bom. 394.

the land with which this case is concerned. The widow in due course got Letters of Administration to his estate with the Will annexed. In 1926 land acquisition proceedings began and certain land was compulsorily acquired in the widow's life-time. The compensation money Rs. 2000 was kept in deposit under section 31 (2) of the Land Acquisition Act. In 1919 the widow died. One daughter had predeceased her and the other died in 1927. Thereupon, in 1928, three sons of the daughter who had first died made applications to the Subordinate Judge for succession certificates with reference to the share due to each in the compensation money. A son of the other daughter objected to these applications but the certificates were granted. Thereupon he appealed to the District Judge, 24 Parganas, who dismissed his appeals with costs. He then applied for and obtained from a Division Bench of this Court three several Rules each calling on the applicant for certificate to show cause why the order of the District Judge should not be set aside. These Rules were granted in the Revisional Jurisdiction and under the powers conferred by section 115 of the Code.

It may be as well that it should here be explained that before making applications for succession certificates the applicants had petitioned the Land Acquisition Judge for payment to them of their share of the money. That Judge had on the 18th April 1928 directed them to obtain succession certificates for withdrawal of the amount from the Court.

The Rules granted by this Court came on for hearing before my learned brothers Suhrawardy and Jack, JJ. It was contended before them that a succession certificate could only be granted in respect of a debt due to the deceased and that the compensation money, even if it was a debt, was not a debt due to the deceased. This was the ground upon which the objector had resisted the grant of these certificates before the Subordinate Judge and before the District Judge. It has now been elaborately discussed in four Courts. In support of the decisions of the Courts below the case of *Abinas v. Probodh* (1) was relied on. The learned Judges of the Division Bench disagreed with this decision and in their order of Reference have discussed various other cases in which a similar question has come before the Courts: *Banckharum v. Adyanath* (2); *Annapurna v. Nalini Mohon* (3), *Bishnoo*

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(1) (1911) 15 C. W. N. 1018. 2

(2) (1909) I. L. R. 36 Calc. 936; 10 C. L. J. 100.

(3) (1914) I. L. R. 42 Calc. 10.

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v. *Mungul* (1); *In re: Mussamut Tripoora Soondurus* (2); *Ranchordas v. Bhagubhai* (3); *Umesh v. Motkura*. (4) They have referred the following questions to the Full Bench:—

(1) If a property is acquired under the Land Acquisition Act after the death of the owner when it was in the hands of his widow or a person having a life-estate and the compensation money is kept in deposit in the Land Acquisition Collector's Office under section 31 of the Land Acquisition Act, 1894, is such amount a debt within the meaning of section 214 of the Indian Succession Act, 1925, for which a certificate under Part X of that Act has to be obtained?

(2) Was the case *Abinas Chandra Paul v. Probodh Chandra Paul* (5) rightly decided?

The reasoning of the learned District Judge was to the effect that if it was proper and necessary for him in this proceeding, and in the absence of the person or authority by whom the sum claimed was alleged to be payable, to determine whether or not in strictness the claim of the applicants for certificate was a claim for a debt due to the deceased, he would be disposed to answer that question in the negative; nevertheless it was not incumbent upon him before making the grant of a certificate to enquire too closely into the questions whether the sum of money claimed was due and whether it had been due to the deceased within the meaning of the provisions of the Succession Act.

The order of Reference in my judgment does not at all points succeed in keeping separate two questions which are different. One question which can be raised is the question whether under section 214 of the Succession Act the Land Acquisition Judge was entitled to refuse an order for payment of any portion of the money unless a succession certificate was produced by the applicant. This question does not arise in the present case. Nor could it be decided between the present parties. The only question which in this proceeding is open for discussion is the question whether the Subordinate Judge, finding that the applicants desired, for the purpose of prosecuting their claim, to be formally clothed with the character of representatives of the deceased, was entitled in all the circumstances of the case, and upon the usual safeguards, to give them a certificate which would have this effect for what it was worth; or whether, on the other hand, he was

(1) (1875) 24 W. R. 203.

(2) (1874) 22 W. R. 45.

(3) (1893) I. L. R. 18 Bom. 394.

(4) (1901) I. L. R. 28 Calc. 246.

(5) (1911) 15 C. W. N. 1018.

obliged to decide in the presence of these parties, and in the absence of the person or authority from whom the money was claimed, the question as to the character and reality of the claim; and whether, if he reached the conclusion, as a result of the evidence adduced, that the compensation money was not a debt due to the deceased, he was obliged thereupon to act upon this view and to refuse a certificate which would enable the applicants to put themselves forward to the Land Acquisition Judge in a representative character.

If the compensation money was not a debt due to the deceased no succession certificate could operate as giving title to the money. Before the Land Acquisition Judge a succession certificate would in no way prevent the objector from contending that the compensation money was not a debt due to the deceased and from putting forward his own title thereto. Indeed in any case in which there is room for serious controversy as to the nature and character of the claim to a sum of money, it is manifestly more convenient, and more in accordance with familiar notions of procedure, that the controversy as to this matter should be carried on and decided after the party desiring to do so has been put in a position to assert any claim of the deceased, rather than that it should be decided in the absence of the party who is interested in getting a good discharge and upon an issue whether or not a right to stand in the shoes of the deceased should be accorded to the person who asks leave to prosecute the claim in that character.

Section 372 of the Succession Act provides that an application for a succession certificate must be verified like a plaint and shall set forth *inter alia* the right under which the petitioner claims and the debts and securities in respect of which the certificate is applied for. Section 373 provides that if the Judge is satisfied that there is ground for entertaining the application, he shall fix a date for hearing and issue certain notices and upon the date fixed or as soon thereafter as may be practicable "shall proceed to decide in a summary manner the right to the certificate." Clauses 2 and 3 are as follows:—

"(2). When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him."

"(3). If the Judge cannot decide the right to the certificate without determining questions of law or fact which seem to him to be too intricate and difficult for determination in a summary

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proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having prima facie the best title thereto."

An examination of this section leads me to the conclusion that the Legislature contemplated first that the District Judge should be satisfied not that a succession certificate will be necessary or exigible under section 214 or otherwise, but that there is "ground for entertaining the application." That is to say, that it is a serious and sensible application by a person who desires to make a claim in the representative character which he seeks. Clauses 2 and 3 contemplate that the Judge shall endeavour to determine whether the applicant is the proper person or a proper person to be clothed with the representative character and it is made abundantly clear that any intricate questions of fact or law bearing upon this question may be solved in a summary manner. The Legislature by exacting fees and by making provision for the requirement of a bond would seem to have taken away all temptation to apply for a succession certificate save in cases where a succession certificate will enable the grantee to prosecute a claim as a representative of the deceased with greater advantage than he would have been able to do in the absence of this representative right. Section 387 provides that no decision under this part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties. In my opinion nothing could be more misguided, unnecessary and objectionable than that questions of the exact character of an applicant's claim should be litigated upon an application for a succession certificate and in the absence of the party or authority against whom the claim is made. The objector in the present case, for example, is in no way damaged by the grant of the certificate. He is entitled to object before the Land Acquisition Judge to any order for payment out of the compensation money upon any ground which he can establish showing that the money was not due to the deceased but is money which, in the events that have happened, is payable to him. If he has any grievance against the order of the 18th April, 1928, he has his remedy. To insist upon litigating the questions at issue between the parties under the provisions of Section 373 of the Succession Act is merely the tactics of obstruction.

On the other hand it would clearly be inconvenient if in a case such as this the Land Acquisition Court should take the

view that the nature and character of the claim was such as to entitle it to require the production of a succession certificate, while at the same time the Judge to whom application for such certificate must be made purported to decide between these parties that the debt in question could not be regarded as having been due to the deceased and that accordingly no right to represent the deceased for the purpose could be given to any one. In my opinion it is not the law that the Court upon an application for a certificate has to decide for itself, as a condition of granting the certificate, that the case is one in which the debt was due to the deceased person within the meaning of Section 214. A reasonable and sensible claim to be enabled to proceed against a third party as being a debtor of a deceased person is sufficient for the purpose of clothing the Court with jurisdiction under section 373 and may be regarded as ground for entertaining the application.

As regards the case of *Abinas v. Probodh* (1), I desire to observe that I do not think that questions of this character can be decided merely upon the principle that it is not necessary or advisable "to place a narrow and restricted construction upon the provisions of the Succession Certificate Act". If this case were a case in which it was proper or necessary to decide the question whether the Land Acquisition Court was entitled to refuse payment to the applicants under section 214 of the Act, it would I think be very necessary to point out that this section is a restrictive section and must be carefully and accurately construed. I demur very strongly, for example, to a contention that arrears of rent accruing due in respect of premises comprised in the deceased's estate in respect of a period subsequent to his death cannot be recovered without a succession certificate. There can be no question under section 214 of treating something as due to the deceased or to his estate by any kind of legal fiction or analogy. The question before us is to be settled in my judgment by a careful consideration of the summary procedure laid down by the Legislature in Section 373. This shows with great clearness that the issue of a succession certificate may be justified without the Court arriving at a conclusion to the effect that such a certificate is a necessary condition without which the claim could not succeed, or that the debts were due to the deceased.

Under Act XXVII of 1860 the effect of a certificate was not
(1) (1911) 15 C. W. N. 1018

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limited to the particular debts mentioned in the application. It was conclusive of the representative title against all debtors to the deceased. In *Bhugobutty v. Bholanath* (1) it was contended that there could be no debts due to the deceased and it was laid down that this was not a matter for the Judge's consideration. "I am inclined to think" said Jackson, J., "it would be convenient if the law provided that all applications for certificate should state that there are debts due to the estate and that the Judge should satisfy himself that there are grounds for making the application". In a later case Loch, J., observed: "It might so happen that the applicant is not aware of the existence of debts, but applies for a certificate as a precaution". *Shuruf v. Thakoormonas* (2). In 1875 we find Glover, J., repeating the same rule and in the same way as Jackson, J. had done: "The current of decisions in this Court . . . seems to lay it down that the petitioner for a certificate need do nothing more than prove his title to collect the debts if there are any. I should certainly have thought that it was first necessary to show that there was a need for the certificate by giving at least prima facie evidence of the existence of debts; but as I have not been shown any decision going to that length I am willing to follow the rulings mentioned above, and to hold that the petitioners' title was the thing to be looked to": *Beemul v. Shikhar* (3). The basis of these decisions was the language of Section 3 of the Act of 1860, on which it appeared that the one thing which the Court had to do was to "determine the right to the certificate". "It may be" as Jackson, J., observed in the case already cited *Bhugobutty v. Bholanath* (1) "that the person who obtains such certificate obtains an entirely barren title, and that he would derive no benefit from it whatever, but that is his affair". Now *Bishnoo v. Mungul* (4) which has been greatly relied upon by the objector in this case was decided under the Act of 1860 and the observations of Mitter, J. were made with reference to the construction put upon the Act by the cases to which I have referred and by other cases decided in the same sense. He says of them "It is sufficient to observe that they merely lay down that . . . it is not the business of the Judge to enquire into the question whether there were debts due to the deceased person or not. Granting that to be the case, it does not follow that when without any inquiry it is admitted by the parties that

(1) (1867) 8 W. R. 317.

(2) (1868) 9 W. R. 240.

(4) (1875) 24 W. R. 203.

(3) (1875) 24 W. R. 211.

there were no debts due to the deceased the Court would still be bound to grant a certificate under Act XXVII of 1860.¹ Mitter, J. was dealing with the case upon appeal: he gives no support to the theory that there has to be a finding as to the existence of debts due to the deceased as a condition of the Judge's jurisdiction to grant a certificate. He is only saying that the Court is not helpless and is not bound to grant an application which can be seen without further enquiry to be baseless.

When the Legislature came to amend the Act of 1860 it took occasion in the new Act (VII of 1889) to effect several changes. The most important change was that it permitted an applicant to confine his application to those debts which he chose to include and gave the certificate effect only as regards the particular debts specified therein. It made more clear that the Judge's enquiry was to be summary but it retained as the description of the subject matter the phrase "the right to the certificate." There is every reason to think that the line of decisions from which I have cited had not escaped its attention. It seems indeed to have adopted, if not adopted, the language of Jackson, J., in *Bhugobutty v. Bholanath* (1) (above cited). It required the Judge not to decide upon contest whether the particular debts included in the application were really due at all or were really due to the deceased but to satisfy himself before he fixed a day for hearing or issued notices "that there is ground for entertaining the application." To my mind there is both logic and policy in this. I do not say that the Judge may not change his mind and in the end dismiss the application as baseless altogether but the contest after notices have issued is still to be confined to "the right to the certificate." Prima facie a person disputing the title of the deceased to the debts in question is only putting himself out of Court, showing good reason why some willing person other than himself should be authorised to assert the claim in the right of the deceased. No doubt there may be baseless claims for a certificate and it is right that the Court should not be helpless to resist them. But I demur altogether to any doctrine which involves the Judge in finding upon contest at the enquiry that there is good prima facie evidence that the debts were due to the deceased. If *Radha Rani v. Brindaban* (2) involves this then I think it should be overruled. There the certificate had been granted without

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(1) (1867) 8 W. R. 317.

(2) (1897) I. L. R. 25 Calc. 320.

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any evidence at all although it was opposed. The Judge would seem to have refused to consider at any stage whether there was any ground for entertaining the application. Maclean, C. J. said "I think he is bound to enquire into the matter and require at least some evidence to show that there is a *prima facie* case that the property belonged to the deceased person." This does not seem to mean that he must hear the objector's evidence and argument upon the point and decide whether in the end a good *prima facie* case has been made out upon the evidence as a whole. In the present case for example the Judge if he thought the order of the Land Acquisition Court was "ground for entertaining the application" would have been entirely within his rights. *Hurri Krishna v. Balabhadra* (1) was a very different case: It was an appeal by an applicant who claimed as adopted son and whose application for certificate had been dismissed without enquiry at all as to her right to the certificate. I do not find in the judgments in *Bai Kashi v. Parbhu* (2) any reference to the legislature's provision for the Judge being satisfied that there are grounds for entertaining the application, but the reasoning of *Chandavarkar, J.* in that case is unanswerable in so far as it shows that an enquiry into the existence of the debt is a useless proceeding. The question there was precisely as here whether the debt belonged to the deceased or to the objector in an independent right. The same view has been taken in Madras: *Srinivasachariar v. Gopalan* (3).

Of the two questions which have been put to the Full Bench I would observe that the first question together with a considerable portion of the order of Reference deals with a matter which in this case does not arise. We are not here concerned with the question whether a certificate "has to be obtained." We are only concerned with the question whether the learned Judge had jurisdiction to issue the certificate. As regards the question whether *Ahinas's* case (4) was rightly decided, I am of opinion that it was open to the Court in that case to make the order which it made, namely to send the case back to the District Judge for retrial in accordance with law. But I am not prepared to say that I approve of the reasoning by which this order was supported.

In my opinion the Subordinate Judge had jurisdiction to make the order in this case and the opposition on the part of the

(1) (1896) I. L. R. 23 Calc. 431.

(2) (1903) I. L. R. 28 Bom. 119.

(3) (1914) 25 M. L. J. 365.

(4) (1911) 13 C. W. M. 1018.

objector has been misguided throughout. In my judgment the case is not one, on any view of it, which calls for our interference under Section 115 of the Code and the correct order to make is that we should discharge the Rules with costs before the Division Bench and before us. Consolidated hearing fee before both Benches five fold mohurs.

C. C. Ghose, J.—I agree.

B. B. Ghose, J.—I agree.

M. N. Mukerji, J.—I agree.

D. N. Mitter, J.—I entirely agree in the judgment delivered by my Lord Chief Justice.

A. T. M.

Rule discharged.

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APPELLATE CIVIL

Before Mr. Justice M. N. Mukerji and Mr. Justice S. C. Mullick.

SAILENDRA NATH BOSE AND OTHERS

v.

CHARU CHANDRA BANERJI AND OTHERS.*

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March, 6.

Suit, maintainability of—Declaratory suit—Specific Relief Act (I of 1877), Sec. 42—Infructuous declaration.

Section 42 of the Specific Relief Act does not sanction every form of declaration but only a declaration that the plaintiff is entitled to any legal character or to any right to any property: *Deshali v. Kedar Nath* (1).

A Court will never make a declaration that is likely to be infructuous.

Three separate *jamas* were held by defendant No. 31 under three sets of land-lords, defendants Nos. 1 to 30. Defendant No. 31 mortgaged the *jamas* with other lands to the plaintiff. The landlords however, ignoring the existence of the separate *jamas* instituted two suits for rent treating all the lands as constitut-

*Appeal from Appellate Decree No. 564 of 1927, against the decree of Babu Kamini Kanta Dutt, Subordinate Judge of Khulna, dated the 30th September, 1926, affirming that of Babu Nripendra Nath Guha, Munsiff, said Court, of Khulna, dated the 27th July, 1925.

(1) (1912) 1. L. R. 39 Calc. 704.

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ing one *jama*. Having obtained decrees the defendants Nos. 1 to 30 put up the lands to sale alleging that they were the lands in arrears. The plaintiff then instituted the present suit asking that a declaration might be made that the two decrees were really money decrees and the *mahal* in arrear could not be sold with power to annul incumbrances under Chapter XIV of the Bengal Tenancy Act :

Held, that the suit was not maintainable, as the relief prayed for was one which was not authorised by section 43 of the Specific Relief Act and as such a declaration, if permitted, would be infructuous without a relief in the shape of permanent injunction.

Appeal by the Defendants.

Suit for declaration.

The material facts appear from the judgment.

Messrs. Narendra Chandra Bose and Satyendra Nath Mitter for the Appellants.

Messrs. Kshitish Chandra Chakravarty and Panchanan Ghoshal for the Plaintiff Respondent.

The judgment of the Court was as follows :

March, 6.

The suit out of which this appeal has arisen has been decreed by both the Courts below.

The plaintiff's case was as follows :—There is a Gantijama comprised of about 900 Bighas of land of which the holders were the defendants Nos. 1 to 23, Nos. 24 to 29 and one Kedar Ghosh, and No. 30, owning respectively 5-6th, 1-12th and 1-12th shares therein. The defendant No. 31 for himself and also on behalf of his brother the defendant No. 32 obtained a *maurashi mokarari* lease of a 5-6th share of the said *jama* from the defendants Nos. 1 to 23 in 1308 B. S. at a rental of Rs. 303 and odd. Subsequently the defendant No. 31 obtained settlements of an 1-12th share from the defendants Nos. 24 to 29 and the said Kedar Ghosh at a rental of Rs. 30 and odd, and also a settlement of the remaining 1-12th share from the defendant No. 30 at the same rental. Thereafter the interest of Kedar Ghosh passed to the defendants Nos. 19 to 23 and the defendant No. 32 sold his interest to the defendant No. 31. Thus there were three separate *jamas* held by the defendant No. 31 under three sets of landlords. The defendant No. 31 mortgaged these three *jamas* to the plaintiff along with other lands by a registered deed executed in 1326 B. S. for Rs. 5000. The landlords however, ignoring the existence of the separate *jamas* instituted two suits for rent treating all the lands as constituting one *jama* and as bearing a total rental of Rs. 364 and odd. One of these suits was No. 829 of 1923 in which the defendants Nos. 31 and 32 were both impleaded as

defendants. The other suit was No. 2308 of 1923 which was by all the landlords with the exception of defendant No. 21, and against the defendant No. 31 only. Having obtained decrees in the aforesaid suits the said defendants Nos. 1 to 30 put up the lands to sale alleging that they were the lands in arrears. The plaintiff then instituted the suit asking for the following reliefs : (Ka) that a declaration may be made to the effect that the two decrees aforesaid are really money decrees and the mehal in arrear cannot be sold with power to annul incumbrances under Chapter XIV of the Bengal Tenancy Act ; (Kha) that it may be declared that the lands attached form a maurasi mokarari intermediate ganti jama and not a nontransferable ryoti jama ; and (ga) that a temporary injunction may be granted restraining the defendants Nos. 1 to 30 from selling the attached properties by auction till the final disposal of the suit. Prayer (kha) appears to have been subsequently withdrawn and prayer (ga) was rejected by the trial Court inasmuch as there was no prayer for permanent injunction to the same effect. The Courts below have decreed the suit in plaintiff's favour in terms of prayer (ka).

Apart from the objection that in instituting the suit the plaintiff was crying before he was hurt—for it may just as well be that the mortgage would never be annulled even though the properties—are sold with power to the purchaser to annul all encumbrances the suit for the declaratory relief which the plaintiff asked for in prayer Ka in our opinion was not maintainable in law. The declaration asked for is in substance merely a declaration as to the legal effect of two decrees passed by the Courts. If this declaration was asked for as ancillary or introductory to some other relief or reliefs also asked for, section 42 of the Specific Relief Act would have had nothing to do with the matter and such a declaration would have rested on long established practice ; but as the relief for this declaration stands alone it is one which must be authorised by that section, which does not sanction every form of declaration but only a declaration that the plaintiff is entitled to any legal character or to any right to any property [See *Deokali Koer v. Kedar Nath* (1)]. The declaration asked for does not go anywhere near what section 42 of the Specific Relief Act contemplates. Indeed it is not even alleged that the plaintiff's status or right at mortgagee has ever been denied. Again if it be assumed that such a declaration is permissible, it will be simply infructuous, without a relief in the shape of a permanent injunction for the Court in

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which the decrees are executed will in no way be bound by a declaration made by a different Court as to the character of the decrees under execution before it. It is well established that a Court will never make a declaration that is likely to be infructuous.

It has been brought to our notice that the respondents Nos. 29 to 29a have died during the pendency of this appeal and their heirs have not been brought on the record. The appeal in so far as those respondents are concerned must be taken to have abated and to have proceeded without them. This however does not affect the appeal as against the other respondents which in our opinion, must succeed, and it is accordingly allowed, the decrees of the Courts below being set aside and the suit dismissed with costs in all the Courts.

A. T. M.

Appeal allowed.

Before Mr. Justice Jash and Mr. Justice D. N. Mitter.

ABINASH CHANDRA GHOSH

v.

NARHARI METHER AND ANOTHER.*

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1929.

March 22

Limitation—Limitation Act (IX of 1908), Sch. I. Arts. 141, 143—Adverse possession against Hindu widow—Suit by reversioner after widow's death.

A suit brought by a reversioner for possession of immovable property to the possession of which a female heir had been entitled is not barred if brought within 12 years from the death of the female heir, although she may have been out of possession for more than 12 years. It is only barred when the adverse possession was the result of a decree which is binding against the reversioner †: *Vithialinga v. Srirangika* (1) explained. *Arabindo Tagore v. Manorama* (2) dissented from.

* Appeal from Appellate Decree No. 702 of 1927, against the decree of N. G. A. Edgley Esq, Additional District Judge, 1st Court, of 24 Pergannas, dated the 22nd November, 1926, reversing that of Babu Hem Chandra Mitra, Subordinate Judge, 2nd Court, Allpore, dated the 30th June, 1925.

† See *Musammait Jagro Bai v. Utasra Lal* (1929) 50 C. L. J. 52 (P. C.)—Rep.

(1) (1925) L. R. 52 I. A. 322; 42 C. L. J. 563.

(2) (1928) I. L. R. 56 Calc. 903; 32 C. W. N. 915.

Article 143, Schedule I of the Limitation Act has no application where the relationship of landlord and tenant does not exist between the parties.

Appeal by Defendant No. 1.

Suit for recovery of possession after declaration of title.

The material facts appear from the judgment.

Messrs. Brojendra Nath Chatterjee, Satindra Nath Roy Chowdhury and Banku Behary Mullick Chowdhury for the Appellant.

Mr. Rupendra Kumar Mitter for the Plaintiff Respondent.

The following judgments were delivered :

D. N. Mitter, J. The plaintiff now respondent having sued to recover possession of a plot of land now in dispute in this suit after declaration of his title to the same had his suit dismissed by the Subordinate Judge of 24 Pergannas on the ground of limitation there being a finding in his favour on the question of title. This decision has been reversed by the Additional District Judge of 24 Pergannas on appeal and plaintiff's suit had been decreed.

Against the decision the defendant No. 1 has preferred this appeal. Two points have been argued on this appeal (1) that the decision of the Lower Appellate Court that the suit is not barred by limitation is wrong (2) that the Lower Appellate Court was clearly in error in not allowing the appellant to support the judgment of the Subordinate Judge on the ground that the plaintiff had failed to establish title to the disputed land a ground which had been decided against him by the Court of first instance and in so doing has misunderstood the plain provisions of Order XLI rule 22 of the Code of Civil Procedure.

The material facts necessary for determining the questions raised by this appeal are these :—The property in suit admittedly belonged to one Rup Narain Basak and by successive transfers devolved on Padmabati. On her death it devolved on her son Lakhi Narain Goswami. Lakhi Narain died leaving behind him a widow Dino Moyee who obtained a Hindu widow's estate in the property now in question. She executed a deed of surrender of all her husband's estate in favour of one Atal Goswami. Atal who was the next reversioner died in the month of Assar 1327 B. S. On Atal's death the property devolved on his widow Mrinalini, as Atal left no son but only two daughters besides the widow behind him. Mrinalini sold the disputed plot to the plaintiff for legal necessity. This is plaintiff's title. Plaintiff's case is that defendant No. 1's father executed a Kabuliati in favour of Dinamoyee but as this deed is an unregistered document it has been rightly excluded from evidence and nothing more need be said about it.

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Plaintiff's case further is that a registered Kabuliati in respect of the disputed land (Ex. 6) was executed by defendant No. 1 in the year 1298 B. S. in favour of Dinamoyee in the benami of defendant No. 2. In 1910 Dinamoyee brought a suit for rent against defendant No. 2 on the basis of the Kabuliati. In that suit on the objection of defendant No. 2 defendant No. 1 was impleaded on the 28th June 1910. The suit however was decreed against defendant No. 2 and dismissed against defendant No. 1, as he denied the relationship of landlord and tenant. The decree was executed against defendant No. 2 and the land and the hut standing thereon was attached as the appellant states. The respondent says that only the hut was attached on the 14th July 1910. It does not appear clear on the proceedings whether the land and hut were both attached. On the other hand the register shows that the hut only was attached. A claim was preferred by defendant with the result that defendant No. 1 was found to be in possession on his own account and the attached property whatever it was was released. The present suit was instituted originally on August 3rd 1922 and the Subordinate Judge held that as the suit was filed more than 12 years after the 28th June 1910 the date when the denial of tenancy by defendant No. 1 was given effect to the suit was barred by limitation. On the other hand the learned District Judge has reached the conclusion that Article 143 of the 1st Schedule to the Limitation Act applied and the forfeiture was incurred not on the date when the denial was given effect to by the judgment of the Munsif but on the date when some overt act was done by Dinamoyee i. e. on the date when she served a notice on defendant No. 1 i. e. on the 15th January 1911 and as such the suit was well within the period of limitation. The appellant contends that this view cannot be sustained.

It seems to us that Article 143 has no application to the present case because the relationship of landlord and tenant does not exist and has not existed between the plaintiff and defendant No. 1. It was so decided in the Rent Suit No. 672 of 1910 in the Munsif's Court at Sealdah. The defendant No. 1 has been in adverse possession for more than 12 years before the present suit. Dinamoyee died on the 1st of April 1918 and the present suit has been instituted within 12 years from the date of her death. The question is whether the adverse possession against Dinamoyee could be tacked to the adverse possession against the plaintiff or his predecessor in title so as to extinguish plaintiff's right. Atal Goswami through whom the plaintiff claims did not inherit the

disputed property from Dinamoyee but from Lakhi Narayan whose reversionary heir Atal was. In these circumstances the adverse possession of defendant as against Dinomoyee cannot be tacked to the adverse possession as against Atal who died in 1920 or of his successor in interest. It is argued however for the appellant that the adverse possession which barred the widow Dinamoyee would also bar the reversioner Atal or the plaintiff who claims through him. This contention however seems to be opposed to the decision of their Lordships of the Judicial Committee in the case of *Rancker Das v. Parvatibai* (1) where the defence of limitation was raised but their Lordships held that it did not apply saying: "It is not necessary to consider what might be the case if the widows or the survivor of them were suing as the plaintiff does not derive his right from or through them and the extinguishment of their right would not extinguish his." It is said on behalf of the appellant that this decision has been explained in another recent decision of their Lordships of the Privy Council in the case of *Vaithialinga v. Srirangatha* (2) and it is contended that the true effect of this later decision of their Lordships is to hold that adverse possession for more than the statutory period which would bar a widow would also bar the reversioner. In support of this contention reliance has been placed on a recent decision of Mr. Justice Page in the case of *Arabindo Tagore v. Manorama Devi* (3). It seems to us that the decision in *Vaithialinga's* case (2) above referred to turned on the circumstances that the decree of 1892 as to adverse possession was binding on the estate. In this case their Lordships were really considering the rule in the *Shivaganga* case (4) namely:— "Where the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is in the absence of fraud or collusion, binding on the reversionary heir." Although it is not right to speak of a Hindu widow's estate as a mere estate for life for as has been pointed out by their Lordships of the Judicial Committee of the Privy Council in the case of *Moniram Kolita v. Keri Kohitani* (5) she holds an estate of inheritance to herself and the heirs of her husband still

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(1) (1899) L. R. 26 I. A. 71; I. L. R. 23 Bom. 725.

(2) (1923) L. R. 52 I. A. 322; 42 C. L. J. 563.

(3) (1928) I. L. R. 56 Calc. 903; 32 C. W. N. 915.

(4) (1863) 9 M. L. A. 563; 2 W. R. P. C. 31.

(5) (1880) I. L. R. 5 Calc. 776 (789); L. R. 7 I. A. 115; 6 C. L. R. 322.

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for the purposes of limitation it must be taken to be an estate of an ordinary tenant for life and as Sir Charles Farran, C. J. of Bombay pointed out that article 141 appears to be intended for limitation purposes to do away with the anomalies which surround a Hindu widow's estate and other estates analogous thereto and to assimilate it for these purposes and for these purposes only to that of the estate of an ordinary tenant for life; see *Vundravandas v. Curson-Das* (1). This decision was affirmed on a peal by their Lordships of the Judicial Committee in *Ranchar Das v. Parvati* (2) already referred to. The decision of the Judicial Committee in *Ranchar Das's* case (2) has always been understood in India as an authority for the proposition that the statutes of limitation can never begin to run against the reversioner in consequence of dispossession of the limited owner whether a Hindu widow or daughter and that in all cases the reversioner has 12 years from the death of the Hindu widow or daughter or mother as the case may be in which to sue for recovery of possession of property from which the Hindu female was dispossessed. See *Radha Kissen v. Navratam* (3); also *Kedar Nath v. Jatindra* (4). Adverse possession cannot run against the reversioner until after the death of widow or daughter as the case may be but where the adverse possession was the result of a decree which is binding against the reversioner is barred. It was to this latter state of circumstances that their Lordships of the Judicial Committee were referring in *Vaithialinga's* case (5) as will appear from the following observation of Sir John Edge. "The result of the cases to which their Lordships have referred shows in their opinion that the Board has invariably applied the rules of the *Shivaganga* case (6) as sound Hindu Law where that rule was applicable" and the *Shivaganga* case (6) laid down that a decree fairly obtained against a Hindu widow was binding against the reversioner if the decree is not tainted by fraud and collusion. A case is an authority for what it actually decides and not for what would logically follow from such decision. *Vaithialinga's* case (5) does not in my opinion lend support to the proposition that adverse possession which barred the widow will also bar the reversionery heir under the present

(1) (1897) I. L. R. 21 Bom. 646 (669).

(2) (1899) L. R. 26 I. A. 71; I. L. R. 23 Bom. 725.

(3) (1907) 6 C. L. J. 490. (522).

(4) (1908) 9 C. L. J. 236 (238).

(5) (1925) L. R. 52 I. A. 327; 42 C. L. J. 563.

(6) (1863) 9 M. I. A. 339; 2 W. R. P. C. 31.

Limitation Act. I am not unmindful of the fact that Mr. Justice Page has in the *Tagore* case (1) already referred to arrived at the conclusion that the adverse possession against the widow would be effective as against the reversioners but with great respect to my learned brother it is difficult to read *Vaithialinga's* case (2) as supporting the broad proposition that adverse possession for more than the statutory period which was not the result of an adverse decree against a Hindu widow would bar the reversioner.

It is true that the Judicial Committee in *Vaithialinga's* case (2) quoted the following observation of Sir Barnes Peacock in the Full Bench case of *Nobin Chunder v. Issur Chunder* (3) and said that those observations were very instructive. Sir Barnes Peacock said "It is said that the reversionary heirs could not sue during the life time of the widow (for possession) and that therefore they ought not to be barred by any adverse holding against the widow at a time when they would not sue. But when we look at the widow as a representative and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion we are of opinion that they are also bound by limitation by which she without fraud or collusion is barred." At the time of that decision the Limitation Act was the Act of 1859 under which it was held that the adverse possession which barred the widow or other females having limited estates barred also the reversioners. In the later Limitation Acts of 1871, 1877 and 1908 a reversionary heir was permitted to sue within 12 years from the time when his right to possession accrued i.e. from the date of the death of the Hindu female (Article 141). In *Herimath Chatterjee v. Mathur Mohan* (4) Lord Watson said :— But you must show that the new law gives a right of action to a reversioner notwithstanding that the widow's right of possession had been extinguished by decree. These observations of Lord Watson are referred to in *Vaithialinga's* case (2). From this it appears that the actual decision in *Vaithialinga's* case (2) proceeded on the principles of the *Shivaganga* case (5) namely that the decree of 1892 as to adverse possession was binding upon the estate.

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(1) (1928) I. L. R. 56 Calc. 903 ; 32 C. W. N. 913.

(2) (1925) L. R. 52 I. A. 322 ; 42 C. L. J. 563.

(3) (1866) 9 W. R. 505.

(4) (1893) L. R. 20 I. A. 183 ; I. L. R. 21 Calc. 8.

(5) (1863) 9 M. L. A. 539 ; 2 W. R. P. C. 51.

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The Allahabad High Court reads *Ranchar Das's* case (1) as laying down that under Article 141 of the Second Schedule to the Indian Limitation Act 1877 a suit can be brought by a reversioner for possession of immoveable property to the possession of which a female heir had been entitled within 12 years from the date of the death of the female heir, although she may have been out of possession for more than twelve years. See *Amrit Dhar v. Bindesri* (2).

It is not necessary to consider in this case whether Article 142 would apply where the widow died a civil death by surrendering all her husband's estate in favour of the next reversioner or would apply only to the case of natural death for in this case both the civil death and the natural death of Dinamoyee took place within 12 years of suit.

In this view we think that the decision of the Lower Appellate Court was right although our reasons are very different from those of the learned District Judge.

With regard to the second ground taken the learned District Judge was clearly in error for, under Order XLI Rule 22 it was open to defendant No. 1 who was the respondent before the Lower Appellate Court to support the decree of the Court of first instance on the ground of defect in plaintiff's title although such ground has been decided against him and we would have remanded the case to the Lower Appellate Court but for the circumstance that it is proved by defendant's own documents that the disputed land belonged to Lakhi Narain Goswami through whom plaintiff claims and the Munsiff rightly points out the frivolous nature of the defence regarding title to the property in question. In these circumstances it would be useless to send back the case for a re-hearing of the appeal on the question of title.

The result is the appeal fails and is dismissed with costs.

Jack J :—I agree.

A. T. M.

Appeal dismissed.

(1) (1899) L. R. 26 I. A. 71; I. L. R. 23 Bom. 725.

(2) (1901) I. L. R. 23 All. 448.

Before Mr. Justice B. B. Ghose and Mr. Justice Panton.

NARENDRA NARAYAN CHOWDHURY

v.

NAGENDRA NARAYAN CHOWDHURY AND OTHERS.*

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1928.

December, 21

Primogeniture—Custom—Military tenure, if its nature is altered by taking settlement from Government—Aboriginal tribe—Adoption of Hindu law.

It is a question of fact whether certain people, assuming their origin to be aboriginal, have adopted the Hindu Law as a whole in matters of succession.

Where a custom was originated in a family for certain reasons, it cannot be said that those reasons being non-existent, the custom itself should cease to exist. In such a case the principle embodied in the expression *cessante ratione cessat lex* does not apply: *Rao Kishore v. Musammal Gakenabai* (1). But it is quite different where the claim is made on the basis of the nature of the tenure. When the nature of the tenure is altered, the rule of succession is altered: *Rajkishore v. Ramjei* (2).

Assuming that the Mechpara Zemindari was military tenure at the commencement as soon as the zemindar took the Permanent Settlement, the nature of the tenure was altered and he became an ordinary zemindar subject to the general law of succession. If there was a family custom of primogeniture, that custom could not have been wiped out by the fact that the zemindar took a new settlement from the Government: *Rao Kishore v. Musammal Gakenabai* (1).

The custom of primogeniture may be lost by acts of parties: *Rajkishore v. Ramjei* (2).

Appeal by the Plaintiff.

Suit for recovery of possession.

The material facts appear from the judgment,

Messrs. Langford James, U. L. Sen Gupta, K. C. Chakravarty, Panchanan Ghosal and Durga Charan Roy Chowdhury for the Appellant.

Sir Benode Mitter and Mr. Jotindra Nath Sanyal for Defendants Nos. 7, 8 and 10 Respondents.

Mr. N. N. Sircar (Advocate-General), Messrs. S. C. Roy and Santi Kumar Roy Chowdhury for Defendants Nos. 9 and 11 Respondents.

Messrs. Sarat Chandra Roy Chowdhury and Santi Kumar Roy Chowdhury for Defendants Nos. 12 and 13 Respondents.

Mr. S. N. Guha and Syed Nasim AH for Court of Wards.

*Appeal from Original Decree No. 53 of 1925, against the decree of Mr. R. N. Pukhan, Subordinate Judge at Dhubri, dated the 17th September, 1924.

(1) (1919) 24 C. W. N. 601.

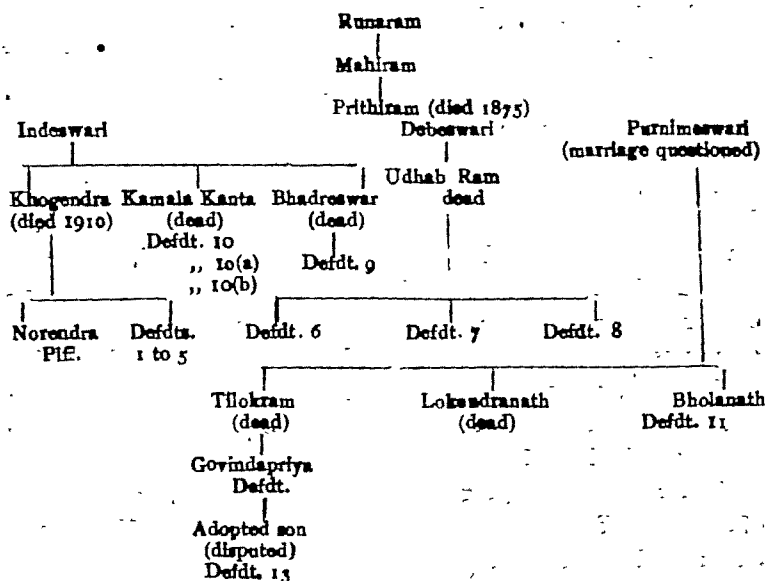
(2) (1872) 1 L. R. 1 Calc. 186; 10 W. R. 8.

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Mr. Suresh Chandra Talukdar for the Deputy Registrar.

The following judgments were delivered :

B. B. Ghose J:—This is an appeal by the plaintiff against the judgment and decree of the Subordinate Judge, Assam Valley Districts, dismissing the plaintiff's suit for recovery of possession of an estate, which has been described as the Mechpara Estate. Plaintiff's suit is based upon the allegations made in the first paragraph of his plaint that the Mechpara Zamindari belongs to a well known Rajbansi caste and the Mechpara Estate has been impartible and inalienable since time immemorial by virtue of the *Kulacher* or custom governing the same family. Plaintiff then goes on to state that his grandfather Prithiram was married to three wives and he had some children begotten of a maidservant by the name of Purnimeswari. His grandfather died in 1875 and disputes broke out among the sons of Prithiram and in order to purchase peace his father Khogendra the other legitimate son of Prithiram and the sons born of the lady who was called the maidservant entered into a compromise, evidenced by a Solenama, dated the 14th December 1875, by which they had divided the estate into different shares. Khogendra died in February 1910, and the plaintiff has been since then in possession of one anna odd share of the estate. He now brings this suit for recovery of possession of 14 annas odd share of the estate as against his own brothers, who are defendants Nos. 1 to 5 and the other descendants of Prithiram. He asks for a declaration that he is entitled to the property as the eldest representative of the eldest line of Prithiram's descendants. A short genealogy would be useful in understanding the claims of the parties.



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The plaintiff describes Purnimeswari as a maid servant who was the mistress of Prithiram. His story is that the sons born of Purnimeswari, Tilokram, Lokenath and Bholanath were all illegitimate. Tilokram is dead and is now represented by his widow Gobinda Priya, defendant No. 12 and an adopted son defendant No. 13. Lokenath is dead. He died without leaving any descendants. Bholanath is alive and he is defendant No. 11 in this suit. Of the sons born of Prithiram's wife, Indeswari, Khogendra was the father of the plaintiff and his brothers, defendants Nos. 1 to 5. The second son is Kamala Kanta who is dead and is represented by his son, defendant No. 10 and defendant 10(a) and 10(b). The third son was Bhadreswar who is dead and is represented by his son, defendant No. 9. Prithiram had only one son born of his wife Debeswari named Udhav Ram, who is dead and is represented by his sons defendants Nos. 6, 7 and 8. Defendants Nos. 1 to 5 do not contest the plaintiff's suit. They are as I have already stated the brothers of the plaintiff. Barring them all the other defendants contest the plaintiff's claim. Defendant No. 14 is a manager of the estate under the management of the Court of Wards.

The defendants who contested the suit in the Court below and who also appear as respondents in this Court deny the allegations of the plaintiff as regards the *kulachar* or family custom of Primogeniture or impartibility. Some of the defendants also contest the allegation of the plaintiff that Purnimeswari was not the marri-

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ed wife of Prithiram. On the allegations of the parties, several issues were framed in the Court below, but the only issues of importance which have been discussed before us are three. Those are issues Nos. 7, 8 and 10 which are in the following terms :

Issue No. 7. "Is there any custom of *kulachar* governing the Mechpara family as alleged and if so, is the Mechpara Estate impartible and inalienable by reason of such custom and *kulachar*?"

Issue No. 8. Is the succession to the Mechpara Estate governed by rule of primogeniture as alleged or by the ordinary rules of succession according to the Dayabhaga School of Hindu Law?"

Issue No. 10. "Were Tilokram, Lokenath and Bholanath illegitimate sons of the late Prithiram Chowdhury and as such excluded from inheritance?"

The Subordinate Judge decided the issue No. 10 in favour of the plaintiff and he decided the other two issues Nos. 7 and 8 against him. In the result, as already stated, the entire suit was dismissed. It should be stated at the commencement that Tilokram and Lokenath were older than Khogendra. If they were the legitimate sons of Prithiram then Khogendra would have no title to the estate, assuming that the rule of primogeniture prevailed in the family and the estate was impartible.

Mr Langford James the learned Counsel for the plaintiff contended before us that the Subordinate Judge is wrong in his view that the estate was not impartible or inalienable and that this family is governed by the Hindu Law of Succession. His contentions were (1) impartibility may be due to the origin of the estate or it may be by custom created by agreement among the founders of the family. Inalienability in the same way may be an incident of the tenure and it may be also by custom and. (2) where the family is not Hindu by origin, any persons alleging that the succession to the estate of that family is governed by Hindu Law, has to prove that it has adopted the Hindu Law of Succession. His contention with regard to the second point, is that this family is Rajbansi and therefore non-Hindu by origin, and the Subordinate Judge has not approached the decision of the questions involved in this case from that point of view.

I will take up the second point first as to the applicability of the Hindu Law of Succession to this family, whether the members of the family are Hindus and whether they are governed by the ordinary rules of Dayabhaga as found by the learned Subordinate Judge.

In my opinion, the question whether the family is governed by the Hindu Law of succession or not is a matter of secondary importance with regard to the question of the plaintiff's right to the whole of the estate, but as this question has been elaborately argued before us by both sides, I think it is proper to record an opinion on the question. It is argued by Mr. James that as the family is Rajbansi it is non-Hindu in origin and the defendants, who allége that it is governed by the Hindu Law, must prove that they have adopted the Hindu law of succession. Reliance is placed upon the case *Fanindra Deb Raihat v. Rajeswar Das* (1), in support of this contention. The question is really one of the fact whether these people, assuming that their origin is aboriginal, have adopted the Hindu Law as a whole in matters of succession. The evidence in this case, however leaves no room for doubt that whatever might be the origin of the family, they adopted Hinduism in its entirety and it will be idle to say that they are not governed by the Hindu Law. They are in all essential purposes Bengal Hindus. First it is only necessary to see what names they bear and it would appear that their names can hardly be distinguished from the usual Bengali names. It is undisputed that they have priests and their priests are Bengal Brahmins. The evidence of both sides shows that their last priest was Hara Prosad Chakravarty and it is also stated that they have got a priest at present, but his name does not appear in the evidence. Exhibit XX, which is the budget estimate for the year 1320 of this family, shows the religious ceremonies of the family for which money was spent. These religious ceremonies included Jagannath Puja, Satyanarayan Puja, Mansa Puja, Janmastami Puja, Durga Puja, Punya, Bastu Puja and Saraswati Puja and then Dol Jatra, Kamdeb Puja, Ras Jatra, monthly Kali Puja and so forth.

All these Pujas are performed in well-to-do Bengali families. The pedigree which the plaintiff produced and which was alleged to have been obtained from their deceased family priest Hara Prosad Chakravarty begins by stating their Gotra as Kasyap Gotra and there is mention in their Sapindas in that list. The aborigines have not been proved to care for Sapindas nor have they any Gotras so far as I am aware. This is peculiar to Hindus. Then whenever the plaintiff and the other members of the family describe themselves, they described themselves as belonging to the caste of Rajbansis. There is a large number

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(1) (1885) L. R. 12 I. A. 72; I. L. R. 11 Calc. 463.

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of documents on the record executed by Khogendra and his brothers and the other members of family in which they describe themselves as belonging to that caste. It is only the Hindus who speak of caste. Then coming to the oral evidence it will appear that these people observe mourning on the death of any member of their family and that mourning is observed of 30 days. During the period of mourning they do not take meat or fish, or milk or produce of the milk of buffaloes. That is the practice in orthodox Bengali Hindu families. Then they have the performance of the Sraddh after the expiry of the period of mourning. The evidence of both sides shows that on the death of a member of the family, before the funeral pyre is lighted, there is the *Mukhagni* ceremony which, I believe, is peculiar to Bengali Hindus and it consists of putting lighted reeds to the face of the corpse before the funeral pyre is set on fire. This is generally performed by the eldest son if he is present at the time of the cremation. There is also direct evidence on behalf of the plaintiff as to the family being Hindu. Santoran Burman (witness for the plaintiff) says in answer to question No. 16. The owners of the Mechpara estate are Hindus by creed. Raja Abhoy Naryan Dev, a witness examined on behalf of the plaintiff, and son-in-law of Khogendra Naryan Chaudhury, states in answer to question No. 16 "I know the owners of the Mechpara estate to be Hindus by creed", and he speaks of himself "I am myself a Hindu." "I know the owners of Mechpara estate to be Rajbansis. My marriage was duly celebrated by calling priests and others. In my marriage my father-in-law gave away the bride." Kamini Mohan Guha another witness on behalf of the plaintiff, says in answer to question No. 11, "I think that the zamindars that are at present in Mechpara are governed by the Dayabhaga." It is unnecessary to pile up further evidence. There cannot be the least shadow of doubt that whatever the parties may state in order to serve their own purposes, upon the evidence on the record, the family is governed by the Hindu Law and being residents of Bengal, they must be governed by the Dayabhaga School of Hindu Law.

This finding however, as I have already stated, does not put an end to the plaintiff's case, because assuming that the family is governed by the Dayabhaga School of Hindu Law, the plaintiff is still entitled to prove that the custom of primogeniture prevails in the family and the estate is impartible and inalienable by custom. That there are impartible estates in Bengal in the

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have operated to destroy a family usage regulating the manner of descent". The argument therefore, that is advanced on behalf of the appellant that on account of the nature of the tenure it should be held that it is impartible and succession is according to the rule of primogeniture, cannot be maintained. It is quite true as was observed in the case of *Rao Kishore Singh v. Musammal Gahanabal* (1), that where a custom was originated in a family for certain reasons, it cannot be said that those reasons being non-existent, the custom itself should cease to exist. In such a case, as their Lordships observe, the principle embodied in the expression *cessante ratione cessat lex* does not apply. But it is quite different where the claim is made on the basis of the nature of the tenure. When the nature of the tenure is altered then as their Lordships observed in the case of *Rajkishan Singh v. Ramjoy Surma Mesoomdar* (2), the rule of succession is altered. The plaintiff must, therefore, in order to succeed, rest his case upon a family custom as he had actually pleaded in his plaint and we have, therefore, to see whether the plaintiff has succeeded in establishing a family custom of primogeniture and inalienability. The learned Counsel for the appellant relied upon certain documentary evidence in support of the contention that the plaintiff has been able to establish the custom pleaded. He refers first to Ex. 2 dated 5th April 1790 in which the Board of Revenue asks the Collector to furnish them with a statement of the family of Runneeram who had died before that. The next document is Ex. 4 dated the 17th June 1700 the report of a local official called Roy Royan, which runs thus "his eldest son Mahira is his successor in the zemindary. Respecting any other heirs the deceased zemindar may have left, I am not prepared to report correctly." Subsequently the Commissioner makes this report which found at the top of the paper. "List of the family of the deceased Runneeram, zemindar [of the Metchpara, Sobun the defunct's mother, two wives of Mahiram, a legitimate son aged 9 years, Gumburam a legitimate son aged 4 years, a legitimate son whose name is unknown aged one and a half years, Rupram an illegitimate son aged 15 years and an illegitimate son whose name is unknown aged 12 years. N. B. The defunct has not left any other relations". Upon this report the Board of Revenue made this direction "We direct that Mahiram the eldest legitimate son of the late Runneeram be allowed to succeed his father in the zemindary of Metchpara after the usual publication has been made in the district and at the Khalsa." This is dated the 21st July 1790.

(1) (1919) 24 C. W. N. 601.

(2) (1872) 1 L. R. 1 Calc. 186; 19 W. R. 8,

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father's property was allowed to Prithiram and the remaining one third to Madhoram. To this no objection has been made by either party. I, therefore, assume this point as settled." This shows beyond any doubt that the estate was not considered descendible according to the rule of primogeniture, nor was it impartible. The illegitimate son was allowed one third share of the property left by Madhoram. It is contended on behalf of the appellant that at that time Prithiram was an infant and therefore no objection could have been taken on his behalf. The estate was taken charge of by the Court of Wards on behalf of both the minors and their mothers were appointed their guardians. It is quite true that Prithiram himself could not object to this division of the estate, he being a minor. But if the custom of primogeniture in the family was so well established as the plaintiff would ask us to believe, is it conceivable that the Collector who had made enquiries about the right of the illegitimate son and went into the trouble of taking into the *Beastha* of the Pundits of Assam as regards his rights, could not have been cognisant of the well established custom of the family of primogeniture, and can it be believed that if there was such a custom, he would not have reported that by the custom of the family Prithiram would be the sole owner, even if he had a brother born of a lawful wife of his father? It is next argued on behalf of the appellant that the fact that one-third of the property was allowed to Madhoram, the illegitimate son of Mahiram, is of no consequence, because Madhoram died in 1834 and after that Prithiram claimed the entire estate to the exclusion of the mother of Madhoram, who would have been his heir. The learned Subordinate Judge in dealing with this argument has observed that probably the lady was living in the family and did not care to assert her own rights. That may be one explanation. But assuming that the lady was put aside, it would not prove primogeniture. The utmost that the plaintiff could urge was that widows did not succeed to the estate. This one fact that Madhoram got a share goes strongly against the claim of the plaintiff. Reliance is next placed upon the oral evidence on behalf of the plaintiff. This oral evidence consists of the statements made by three persons, the first of them being Santoram Burman. He gives his age as 90 or 91 years. His position is that he was menial servant of Prithiram on a pay of Rs. 3 per month and speaks about the rules of primogeniture in a secondary estate of a considerable value. Under what circumstances this man came to know of the custom, which could never have been a topic of conversation during his time, it is

difficult to say. Apart from the social position of this man, he is an absolutely ignorant person. He does not know anything, what a year is, what a date means, what a month is. He was in service under Prithiram for only about four years. How this man could have possibly known about the rule of succession is difficult to understand. The next witness on whose evidence the plaintiff relies is Kamini Mohan Guha. This man is of a better position in society. He was at first a tutor of the plaintiff under Khogendra Narayan Chowdhury. Then gradually he served the estate in other capacities. He gives evidence to the effect that the custom is that the lawful eldest son of the Metchpara zemindary would inherit the property, the estate is impartible and inalienable. Then when he was asked from whom he had heard it, he said "From Khogendra Narayan Chowdhury", that is the father of the plaintiff and from such other persons who would naturally know of the existence of the custom in the family. As regards Khogendra Narayan's knowledge the Subordinate Judge truly observes that his knowledge is of no account, because that man himself had entered into a partition deed with his brothers. This oral evidence therefore can be dismissed without much comment. The last witness on whom the plaintiff relies is another person named Krishna Mohan, who says "I simply hear that the succession goes to the eldest son." Apart from that, there is the oral evidence of the plaintiff who, of course, does not know anything about the custom, but he says that he heard of it from his father. In order to establish a custom varying the rule of ordinary descent better evidence should have been put forward. A custom of primogeniture might be proved by the fact that there were cadets of the family who had no share in the estate, or that on any previous occasion a right to partition was asserted and successfully resisted. Nothing like such evidence is available in this case. There was an illegitimate son of Mahiram along with a legitimate son and the illegitimate was allotted a share. The next event which disproves this claim of primogeniture is Ex.A, the Partition Deed entered into by all sons of Prithiram dated the 16th December, 1875. In that document it is stated that Prithiram Choudhuri Rai Bahadur, zemindar, died leaving the 7 brothers as his heirs. Then it speaks of dissensions having broken out among them and so forth. By that deed in paragraph 1 it was stipulated that Khogendra, Kamala Kanto, Bhadreswar and Uddhob would be jointly entitled in equal shares to an eleven annas share and Tilak Ram, Lokenath and Bhola-

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nath would be equally entitled to a five annas share in the property. This was followed by application for mutation of names in the Collectorate. Ex. 1 is the petition of Khogendra and others dated 16th December 1875, where the same expression is repeated that Prithiram died leaving 7 sons as his heirs surviving. Ex. J, is the petition by Tilokram of the same date. Ex. K, dated 17th July 1876 is a petition by Khogendra for opening separate accounts and in it it is stated that Khogendra had inherited moveable and immoveable properties of the shares stated in the petition as heir to the properties left by Prithiram. After that suits were brought by Khogendra and all the other descendants of Prithiram for rent against tenants and these documents range from the year 1880 to 1907 which have been filed as Exhibits in this case. In 1885 Bhadreswar presented a petition for registration of his name after attainment of majority. That is Ex. YYY. Then Exhibit DDD, dated the 13th May, 1892 shows that the widows of some of the heirs, some of the descendants of Prithiram collected rents and Khogendra entered into an Ekrarnama with two of the widows for collecting rents on their behalf. In May 1907 Khogendra mortgaged one anna share of the property, stating that he was entitled to 2 annas 15 gandas share in the property and he subsequently executed another mortgage. All these transactions show that Khogendra not only entered into a partition with the branch born of Purnimeswari but stated throughout that all the seven sons of Prithiram were his heirs and he asserted title to only his fraction of 2 annas 15 gandas, which was a fourth share of the 11 annas which were allotted to him and his other co-sharers. After the death of Khogendra, Norendra the plaintiff in the case applied for mutation of his name for one twenty-fourth share in the 11 annas of the property (Ex. 11). There is a note at the end that Norendra claims 16 annas interest but he was actually in possession of one twenty-fourth share of the 11 annas and he stated later on in a petition dated the 13th November 1911, that he reserved the right to apply for his name being registered with regard to the remaining 13 and odd annas share. This, however, was rejected. Subsequently he mortgaged his share to others.

The matter, therefore, came to this, that assuming that the estate was military tenure at the commencement as soon as the zemindar took the Permanent Settlement, the nature of the tenure was altered and he became an ordinary zemindar subject to the general law of succession. This would be a complete answer to

the argument based on the fact that primogeniture and impartibility must be assumed from the nature of the tenure. If there was a family custom of primogeniture, that custom certainly could not have been wiped out by the fact that the zamindar took a new settlement from the Government. The authority for that proposition will be found in the case of *Rao Kishore Singh v. Musammat Gakenabai* (1) already referred to. But if the case is that the rule of primogeniture was according to the custom of the family, then the question is what would be the result of the acts of Khogendra supposing that the custom has been proved. I have already shown that the custom has not been proved by the evidence which has been adduced. But if there was such a custom, then by the acts of Khogendra that custom was given up. The authority for the proposition will be found in the case of *Rajkishan Singh v. Ramjoy Surma Mosomdar* (2) which has already been referred to. Sir Binode Mitter who appeared on behalf of some of the defendants laid stress upon the observations of their Lordships at page 195 of the report which run thus: "Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes, and the effect cannot be less when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion, and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon."

It is contended on behalf of the appellant that the arrangement entered into by Khogendra was due to compulsion. On the death of Prithiram there were disputes among the brothers and on that account the Deputy Commissioner intervened and they were compelled to enter into this arrangement. Now, it is not a case of arrangement having been entered into by coercion

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or undue influence. Khogendra also, as I have already shown, after having entered into that arrangement, continued to act upon it for nearly 40 years and the documents which have been produced in this case stated distinctly that he came into possession as one of the heirs of Prithiram.

It is true that Norendra the plaintiff, after the death of Prithiram stated that he asserted a claim to the whole of the property. Assuming that that assertion of the claim reserved his right to bring the suit about three days before the period of limitation had expired, had he any subsisting right? If the custom had been discontinued by his father and had been acted upon for such a long period of time, no other member of the family of the succeeding generation could assert that the family custom still subsists. The explanation of Norendra the plaintiff, is that he kept quiet for about 12 years, and dealt with his share of the property as having been derived under the deed of partition for want of funds. Whatever that may be he cannot now reasonably be heard to say that he is entitled to the entire property according to the rule of primogeniture which is the subsisting custom of the family. In my judgment, therefore, the Subordinate Judge is quite right in holding that the plaintiff is not entitled to succeed in his claim. This finding finishes the appeal of the plaintiff. But defendants Nos. 11, 12 and 13 who have appeared separately contend that the Subordinate Judge is wrong in his finding that Purnimeswari was not the married wife of Prithiram and they seek to support the decree of the Subordinate Judge on another ground, that assuming that the plaintiff's story is true that succession to the estate was according to the rule of primogeniture, the plaintiff would have no right as his father was really a junior member of the family. Tilokram, Loknath and Bholanath being older than Khogendra, the father of the plaintiff. Bholanath is the only direct descendant of Prithiram now alive. The learned Advocate-General who appears for him contends that the Subordinate Judge ought to have held upon his own findings that Purnimeswari was the married wife of Prithiram. The learned Subordinate Judge has stated that there is no evidence worth the name that Purnimeswari had been a maid servant. In my opinion, the name Purnimeswari itself would show that she could not have been a maid servant. The name is too aristocratic for a maid servant. However, the learned Subordinate Judge has found that if Prithiram married her at all, he must have married beneath his rank. That is quite possible. This marriage again, as the learned Subordinate Judge finds, if it had

taken place, must have taken place hundred years ago. Bholanath, the last surviving son, is 71 and it is very difficult to find any person alive after this long lapse of time, who could possibly prove to the fact of the marriage, if it had actually taken place.

The evidence is therefore, mainly on the point as to how she was treated and how her sons were treated during Prithiram's lifetime and also subsequent to his death. There is uncontradicted evidence that the sons born of Purnimeswari were treated in the same way as the sons born of the other two wives of Prithiram. They were married to girls of respectable families. The learned Subordinate Judge has found, even after Prithiram's death the lady was regarded as the mistress of the house. After her death all the sons of Prithiram observed mourning (Asouch), as can only be observed in the case of persons belonging to the same gotra. If she was a maid servant and was never married to Prithiram, the other members of the family, the legitimate descendants of Prithiram however they might have regarded for their father's mistress would have no occasion to observe Asouch or mourning according to the Hindu custom after her death. It is unnecessary to restate the instances given by the Subordinate Judge when Bholanath was treated with the respect due to a legitimate son of Prithiram. The Subordinate Judge however, states that if Prithiram chooses to take Purnimeswari as his wife without a formal marriage, no one within the limits of Metchpara would dare to show her disrespect during his lifetime. That may be true, but it may also be stated that no body would show her the respect which is due to a married wife of Prithiram. Then it appears that one of the defendants who has been examined and who says that Purnimeswari was not the married wife of Prithiram had to admit that he had married into the family of the Raja of Jalpaiguri and the Raja of Jalpaiguri himself has married a daughter of Bholanath. It would be impossible to suppose that the Raja of Jalpaiguri, holding such a respectable position among his community would marry the daughter of a person who has such a blot in his pedigree. An attempt has been made to show that the Raja of Jalpaiguri has discarded the daughter of Bholanath as his wife, but the witness Jatindra who gave evidence, as regards this marriage, could not venture to make such an allegation. Then there is the evidence of Tilokram having performed the Mukhagni ceremony of Prithiram, which he would naturally do as a legitimate son, being the eldest when Prithiram's dead body was cremated. Kamini

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Kumar Guha, the witness of the plaintiff, on whom much reliance was placed by the appellant, says that on the death of Khogendra all the zemindars of Metchpara along with Bhôlanath sat together and dined. There is no question and not a tittle of evidence that Bhôlanath was at any time looked down upon as a man born out of wedlock.

The defendant's witness, Rebati Kanta Chakravarty, who is the manager of a different estate, was in the service in the Metchpara estate from the year 1287 to 1319. He gives evidence as to the position which Purnimeswari occupied during her lifetime. He says that Khogendra used to call Purnimeswari "mother", and the witness lived with Khogendra for a long time. Then there is the evidence of this very witness that after the death of Tilokram all the members of the family observed Asouch which would not be the case if Tilokram was not a legitimate son of Prithiram. There is also the evidence of Kamini, plaintiff's witness, who says that Bhôlanath Babu and Khogendra Babu have the same Guru (Spiritual guide) and Purohit. This also would not be the case if Bhôlanath had not been the legitimate son of his father. Taking all these things into consideration it seems to me absolutely wrong to say, after this lapse of time, that Bhôlanath and his brothers were the illegitimate sons of Prithiram. It is not stated that Purnimeswari belonged to a different caste. The only assertion made is that she came as a maid servant. Now even if that be so, as these people belong to the lower caste of the Hindu community, no elaborate formal ceremony is necessary for a legitimate marriage and I do not see that there was any difficulty in having the marriage performed between Prithiram and Purnimeswari. At any rate, she was never treated as a mistress of Prithiram, nor were her sons treated as illegitimate. The Subordinate Judge after stating the facts came to the opposite conclusion merely upon the ground that by the partition Tilokram and his brothers took a little more than the share of illegitimate sons and a little less than the legitimate sons. In settling the dispute some one must make concessions and it is stated that at the time Tilokram was ill and he was asked by certain pleaders as the eldest member of the family to make some sacrifice in order to purchase peace. That might have been a reason for his giving up a small share. It is not improbable that the dispute was with regard to ornaments in the hands of Purnimeswari, she was the last surviving wife of Prithiram and it is not improbable that after the death of two wives of Prithiram, she got all the ornaments belonging to those ladies and after the death

of Prithiram, Khogendra and others would naturally ask for a share of those ornaments.

That might have been the cause of the dispute and if she had those ornaments, Tilokram might very well have given up a small share in the property instead of giving up those ornaments. However that may be, there may be many other reasons why this reduced share was taken and I do not think that the inference of the Subordinate Judge that this concession was made because Tilokram and his brothers were illegitimate, can be the only inference as to why this concession was made. I do not think that this inference is legitimate. Having regard to these circumstances, in my opinion, the plaintiff has failed to establish that Purnimeswari was not the married wife of Prithiram and Bholanath and his brothers were his illegitimate sons. That being so, the plaintiff's claim should also fail on the ground that Tilokram was the eldest surviving son of Prithiram at his death. This appeal must therefore, stand dismissed with costs. There will be two sets of hearing fee. The defendants Nos. 7, 8 and 10 represented by Sir Binode Mitter, will get one set of costs, defendants Nos. 9 and 11 represented by the learned Advocate-General, and defendants Nos. 12 and 13 represented by Mr. Roy Chowdhury, will get another set of costs, to be divided equally among them. The minors' costs have already been paid.

Panton, J. : I agree.

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Appeal dismissed.

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CRIMINAL REVISION.

Before Mr. Justice Sukrawardy and Mr. Justice Jack.

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SULAV CHANDRA DAS

KING-EMPEROR.*

Further enquiry—Palpable error—Superior Court—Criminal Procedure Code (Act V of 1898), Sec. 437.

A revising Court has jurisdiction to order a further enquiry on the same materials.

A superior Court should hesitate before exercising its power under section 437 of the Code of Criminal Procedure to order further enquiry unless there are palpable errors in the decision of the lower Court: *Hari Dass v. Sarit-ulla (1)* and *Abdul Rashid v. Montas (2)*.

Where the District Magistrate in ordering further enquiry has not given any indication in his judgment that there have been such palpable errors in the judgment of the trial Magistrate, he is not justified in holding it to be wrong.

Application for Revision by the Accused under section 435 of the Code of Criminal Procedure.

The accused was charged under section 380 I. P. C.

The material facts appear from the judgment.

Messrs. Girija Prosanna Sanyal and Bejali Charan Sanyal for the Petitioner.

Mr. Debendra Narayan Bhattacharjee for the Crown.

The following judgment was delivered :

This Rule is directed against an order of the District Magistrate of Goalpara dated the 12th February, 1929, ordering further enquiry into the case in which the petitioner was charged under section 380 I. P. C. The only ground that the Magistrate found for further enquiry is stated by him in these words: "With regard to the evidence, the contention that the learned Magistrate has taken an entirely wrong view of the evidence with the

* Criminal Revision No. 358 of 1929, against the order of S. P. Deodai Esq., Deputy Commissioner of Goalpara, dated the 29th March, 1929, reversing that of Mr. N. Phukan, 1st class Magistrate of Dhubri, dated the 17th December, 1928.

(1) (1888) I. L. R. 15 Calc. 608 (F. B.)

(2) (1923) 38 C. L. J. 206.

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result that there has been a miscarriage of justice appears to be not without foundation. I consider it desirable in the interests of justice that the case should be further enquired into." We have gone through the judgment of the trial Magistrate and find that the trial Magistrate has carefully scanned the evidence and come to the conclusion that the case against the accused is at least very doubtful. It is not necessary for us to discuss the evidence and the learned District Magistrate has not done so; but we are of opinion that the view taken by the trial Magistrate cannot be held to be unjustifiable. Though it may be conceded in view of the Full Bench decision in *Hari Dass Sanyal and others v. Saritulla* (1) that a revising Court has jurisdiction to order a further enquiry on the same materials, a superior Court, as has been pointed out in *Abdul Rashid Sheikh and others v. Momtas Sheikh* (2) should hesitate before exercising its power under section 437 Criminal Procedure Code to order further enquiry unless there are palpable errors in the decision of the lower Court. The District Magistrate has not given any indication in his judgment that there have been such palpable errors in the judgment of the trial Magistrate as to justify him in holding it to be wrong. We think that this is a case in which further enquiry is not necessary. We accordingly, make the Rule absolute and set aside the order of the District Magistrate.

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Rule made absolute.

(1) (1898) 1. L. R. 15 Cal. 608 (F. B.)

(2) (1923) 38 C. L. J. 206.

Before Mr. Justice M. N. Mukerji.

KALACHAND GHOSE AND OTHERS

v

TATU (TAHIR) SHAIK.*

Prejudice—Reasons for dismissal of appeal, if to be given—Charge under section 379 Indian Penal Code (Act XLV of 1860) but conviction under section 426.

No reasons need be recorded in support of summary dismissal of an appeal.

* Criminal Revision No. 628 of 1929, against the decision of P. G. Griffith Esq., Magistrate of Murshidabad, dated the 1st March, 1929, affirming that of Babu Jitendrya Mukerji, Magistrate, and class, of Jangipur, dated the 23rd January, 1929.

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Sulav Chandra Das
v.
King-Emperor.

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CRIMINAL.

1929.

Kalachand Ghose

v.

Tatu (Tahir) Shaik.

Where the Magistrate found that the *Kalai* that was cut and taken away, was unripe, a conviction under section 426 of the Indian Penal Code was not illegal though the accused were charged under section 379.

Revision under section 435 of the Code of Criminal Procedure by the Accused.

The accused were convicted and sentenced under section 426 of the Indian Penal Code, each to pay a fine of Rs 30, or in default to rigorous imprisonment for one month; out of the fine, if realised, Rs 20 to be paid to the complainant as costs and compensation under section 545 of the Code of Criminal Procedure.

The material facts appear from the judgment.

Messrs. Benode Lal Ghose and *Mahim Chandra Roy* for the Petitioners.

Messrs Asadussaman and *Jnana Nath Borai* for the opposite party.

The following judgment was delivered:

The petitioners who have been convicted under sec. 426 of the Indian Penal Code have obtained the present Rule upon three grounds. Two of these grounds relate to the summary dismissal of the appeal and they purport to state that the judgment of dismissal was wrong as no sufficient reasons have been given therefor. This argument cannot be supported in view of the fact that no reasons need be recorded in support of the summary dismissal of an appeal. The third ground complains of the prejudice that has been occasioned to the petitioners by reason of the fact that while they were charged with an offence under section 379 I. P. C., they have been convicted under sec. 426 I. P. C. This conviction for an offence with which the petitioners were not charged however, has not been to the prejudice of the petitioners. It is clear that they would not have liked a conviction under section 379 I. P. C., to justify which there are ample findings in the judgment of the trial Court, any more than a conviction under section 426 I. P. C. In any event, the Magistrate having found that the *Kalai* that was cut and taken away was unripe, the conviction for mischief is fully justified. The Rule is discharged.

A. T. M.

Rule discharged.

July. 29.

Before Mr. Justice Pearson and Mr. Justice Patterson.

NRIPENDRA CHANDRA SEN

v.

SASADHAR SAHA AND OTHERS. *

CRIMINAL.

1929.

June, 26, 27.
July, 2.

Dispute concerning land—Criminal Procedure Code (Act V of 1898), secs. 144, 145—Magistrate, if can direct subordinate Magistrate to institute proceedings under section 145—Materials on which to base proceedings.

The District Magistrate has no authority in law to direct a subordinate Magistrate to institute proceedings under section 145 of the Code of Criminal Procedure. Whether such proceedings should or should not be taken is entirely a matter within the Magistrate's own discretion.

Where the District Magistrate in his judgment stated: "The Magistrate should include the whole of the disputed land.....if such action is called for by the circumstances of the case":

Held, that the order was intended to leave the Magistrate free to exercise his own discretion in the matter.

That as the Magistrate in the present case had ample materials before him on which to base the amended proceedings, he acted within his jurisdiction in ordering proceeding to be converted into section 145 proceeding from section 144 proceeding.

Application for Revision under section 435 of the Code of Criminal Procedure by the 1st Party.

Proceeding under section 145 of the Code of Criminal Procedure.

The material facts appear from the judgment.

Messrs. Suresh Chandra Taluqdar and Mohendra Kumar Ghosh for the Petitioner.

Messrs. Mritunjoy Chattopadhyaya and Biraj Mohan Roy for the Opposite Party.

C. A. V.

The following judgment was delivered :

This Rule is directed against an order of a Deputy Magistrate of Madaripur under section 145 of the Code of Criminal Procedure, declaring the opposite party to be in possession of certain disputed land.

July, 2.

*Criminal Revision No. 191 of 1929, against the decision of N. K. Mukherjee Esq., District Magistrate of Faridpur, dated the 23rd November, 1928, affirming that of N. Majid Esq., Magistrate 1st Class, of Madaripur, dated the 15th October, 1928.

CRIMINAL.

1929.

Nripendra Chandra
Sen
v.
Sachchar Saha

It is contended on behalf of the petitioner that the order complained of was without jurisdiction, inasmuch as certain additional lands had been included in the proceedings on which that order was based, not in the exercise of the Deputy Magistrate's own discretion, but in mechanical compliance with a direction given by the District Magistrate.

It is further contended that fresh proceedings should have been drawn up when the additional lands were included, and that the proceedings as finally framed were defective.

What happened was this—On the 23rd March, 1928, an Assistant Sub-Inspector of Matbarcharh Police Station submitted a report to the Magistrate to the effect that the petitioner was in possession of the whole of the land in question, that the opposite party were however putting forward a claim to be in possession thereof, and that, in order to support their claim, the opposite party had on the 21st March 1928 forcibly dug a ditch, planted some plantain trees and erected a hut on the disputed land. On receipt of this report, the Magistrate called for a further report from the officer in charge, and on the 1st April, 1928, the Sub-Inspector reported that some more huts had been erected and some more plantain trees planted on the disputed land, and at the same time submitted a map from which it appeared that the land on which the ditch had been dug, the plantain trees planted and the huts erected, only formed a small portion of the land actually in dispute. The Sub-Inspector's recommendation was therefore that section 145 proceedings should be started in respect of the portion of the land on which the huts etc., stood, and that a section 144 notice should be issued on the opposite party in respect of the rest of the disputed land, whereas the Assistant Sub-Inspector's recommendation had been that a section 144 notice should be issued on the opposite party in respect of the whole of the disputed land.

Acting on the recommendations of the Sub-Inspector, the Magistrate, on the 3rd April 1928, drew up section 145 proceedings in respect of the land on which the huts etc., stood, and issued a section 144 notice in respect of the rest of the disputed land.

The opposite party then moved the District Magistrate against the order under section 144, with the result that that order was set aside.

In setting aside the order the District Magistrate remarked

that "the reports do not disclose such imminence of a breach of the peace as would justify an order under section 144 Criminal Procedure Code in respect of one portion of the disputed land, and a proceeding under section 145 Criminal Procedure Code in respect of the rest", and concluded by saying that "the Magistrate should include the whole of the disputed land in the proceeding under section 145 Criminal Procedure Code and attach the land if such action is called for by the circumstances of the case."

The above order was dated the 21st April, 1928, and on receipt of a copy thereof, the Magistrate, by his order of the 4th May 1928, directed that "the land for which an injunction under section 144 Criminal Procedure Code was passed, should be included in the proceedings under section 145 Criminal Procedure Code." This order was given effect to by amending the proceedings that had already been drawn up in respect of the portion of the land on which the huts etc., stood, and by issuing fresh notices on the parties.

The enquiry was then proceeded with without any further objection from either side, with the result that the opposite party were ultimately declared to be in possession of the whole of the disputed land, i.e. the whole of the land covered by the amended proceedings.

The District Magistrate was moved against the said order, but he declined to interfere, holding that the Magistrate had drawn up proceedings on being satisfied from the reports of the local Police that there was a likelihood of a breach of the peace about the land in dispute and further stating that the District Magistrate had given no direction that proceedings under section 145 Criminal Procedure Code should be drawn up, even if the Magistrate thought that there was no fear of a breach of the peace, but had merely said that it would be better to draw up proceedings under that section in respect of the whole of the disputed land.

Coming now to the questions at issue before us, it appears to be settled law that District Magistrate has no authority in law to direct a subordinate Magistrate to institute proceedings under section 145 of the Code of Criminal Procedure: whether such proceedings should or should not be taken is entirely a matter within the Magistrate's own discretion. The question then arises whether, in the present case, the Magistrate amended the proceedings in the exercise of his own discretion, or because he regarded the District Magistrate's order of the 21st April, 1928 as a direction for

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1929.

Nripendra Chandra

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v.

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the inclusion of the whole of the disputed land, which left no room for the exercise of his own discretion in the matter. The terms in which the District Magistrate's order is expressed go against this view, inasmuch as the concluding words are "The Magistrate should include the whole of the disputed land.....if such action is called for by the circumstances of the case." The order was clearly intended to leave the Magistrate free to exercise his own discretion in the matter, but the question is whether the Magistrate did or did not actually exercise that discretion.

Certain expressions used by the Magistrate in the course of the enquiry, suggest the inference that he did not use his own discretion in the matter, but considered himself bound to act under what he regarded as a direction given by his official superior, the District Magistrate. For example, in the first paragraph of his final order, he says that the District Magistrate directed that a proceeding under section 145 Criminal Procedure Code should be drawn up for the entire disputed land, and that the whole of the land was accordingly, included in the proceedings.

On the other hand, it is clear from what has been stated above, that the Magistrate had ample materials before him, (viz, the Police Reports of the 23rd. March and the 1st April, 1928), on which section 145 proceedings in respect of the whole of the land in question might properly be based. Those reports were, it is true, in favour of the petitioner, but that is really beside the question. They disclosed the existence of a dispute likely to cause a breach of the peace concerning the whole of the land covered by the amended proceedings, and they therefore formed an adequate basis for these proceedings. The proceedings, both as originally framed and as subsequently amended, referred to the Police Report and stated that the Magistrate was satisfied from those reports that a dispute likely to cause a breach of the peace existed between the parties: the amendment merely related to the subject matter of the dispute and did not in any way affect the real basis of the proceedings. In view of those circumstances,—and specially in view of the fact that the Magistrate had ample materials before him on which to base the amended proceedings,—we do not think we would be justified in inferring from a few unguarded expressions used by the Magistrate in the course of the inquiry, that he failed to exercise the discretion vested in him by law,—a discretion that had been expressly left entirely unfettered by the District Magistrate, in his order in the connected section 144 proceedings.

In coming to the conclusion we are fortified by the views

expressed by a Bench of this Court in the case of *Kedar Nath Siddar v. Bijoy Mandal* (1) in which a distinction was drawn between cases in which the Magistrate had sufficient materials before him on which to base proceedings under section 145 of the Code of Criminal Procedure, and cases like that of *Kailash Chandra Pal v. Kunja Behari Poddar* (2) in which the Magistrate had no such materials before him, and based his proceedings entirely on the order of the District Magistrate.

As regards the second point raised on behalf of the petitioner, viz that the amended proceedings are defective, and that fresh proceedings should have been drawn, we do not think there is much force in this, especially as the question has been raised at such a very later stage. The amended proceedings are to all intents and purposes fresh proceedings, and although the terms in which they are couched leave a good deal to be desired, there can be no doubt that they were perfectly well understood by the parties concerned, and that the defects, such as they are, did not make any difficulties, or cause any embarrassment to any one, in the course of the enquiry.

For the above reasons, we are of opinion that the application should be rejected, and the Rule discharged.

A. T. M.

Rule discharged.

(1) (1929) 33 C. W. N. 723.

(2) (1897) 1. L. R., 24 Calo. 391.

Before Mr. Justice Pearson and Mr. Justice Patterson.

INASADDAR ALI AND OTHERS

ISIMULLA AND OTHERS.*

Jurisdiction—Criminal Procedure Code (Act V of 1895), Secs. 133, 139d—Magistrate making over enquiry as to existence of right to subordinate Magistrate—Test.

In proceedings under section 133 Criminal Procedure Code relating to alleged obstruction of a public *gozakh*, the opposite party (the petitioners) denied

*Criminal Revision No. 106 of 1929, against the order of Mr. J. N. Das, Additional District Magistrate of Sylhet, dated the 11th February, 1929.

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Nripendra Chandra
Saha
Sasadhara Saha

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June, 14, 31.

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1929.

Masaddar Ali

v.
Isimulla.

the existence of the right. The Magistrate passed an order making the case over to a third class Magistrate for enquiry and to report to the existence of a public path. His report was submitted and the Additional District Magistrate took the report into consideration and acted upon it by passing an order declaring it to be a public path. Matters then proceeded before a jury, the majority of whom found that the obstruction should be removed :

Held, that the Magistrate had no jurisdiction to make over the enquiry to a subordinate Magistrate.

That under section 133 of the Code of Criminal Procedure the proceedings should be in the hands of a District Magistrate and not in the hands of a Magistrate having 3rd class power.

The test was whether there was or was not reliable evidence in support of the denial of the existence of the alleged public right.

Application for Revision under section 435 of the Code of Criminal Procedure by the Second Party.

Proceeding under section 133 of the Code of Criminal Procedure.

Mr. Priya Nath Dutt for the Petitioners.

Mr. Benoyendra Nath Palit for the Opposite Party.

C. A. V.

The following judgment was delivered :

June, 21.

This Rule is directed against an order passed in proceedings under section 133 Criminal Procedure Code relating to alleged obstruction of a public *go-path*. The conditional order was passed by the Additional District Magistrate on 5th June 1928. On the 20th June the opposite party No. 3 appeared and denied the existence of the right, and the 6th July was fixed for taking evidence. On the 6th July all the opposite parties appeared and gave a denial of the right, whereupon the Magistrate passed an order making the case over to Babu A. M. Dam, E. A. C. for enquiry and to report to the existence of a public path. His report was submitted after enquiry, and the report was in favour of the existence of the right. On the 17th August the Additional District Magistrate took the report into consideration and acted upon it by passing an order declaring it to be a public path. Matters then proceeded before a jury, the majority of whom found that the obstruction should be removed. This Rule was issued on the ground that the provisions of section 139 A had not been complied with, and that the Magistrate had no jurisdiction to direct an enquiry by another Magistrate as to the existence of the right. There was also a question as regards the constitution of the jury to which it is unnecessary to refer further in view of our decision.

It is conceded that the terms of the section 139 A contemplate

an enquiry by the Magistrate himself; there is no such provision in proceedings under Ch. X for deputing a subordinate Magistrate to make the enquiry as is to be found under Ch. XII expressly laid down by the terms of section 148. It is however said that in effect the Magistrate did hold the enquiry himself by reading and acting on the report of the subordinate Magistrate and there has been no prejudice; that the accused participated in all the proceedings in the subsequent stages: and that the omission of the Magistrate to enquire is a mere irregularity which is cured under section 537. We are of opinion that the matter cannot be disposed of in this manner. Upon the result of the enquiry depends the subsequent procedure—either a stay of proceedings, or a further step under section 137 or 138. The test is whether there is or is not reliable evidence in support of the denial of the existence of the alleged public right. The value of the evidence is a matter better determined by the Magistrate if he has heard it himself then if, as appears from the order sheet in the present case, he merely “read the report” of his subordinate. Moreover the Magistrate to whom the enquiry was deputed in the present case was, we are told, a third class Magistrate, whereas the opening words of section 133 show that the intention is that this class of proceeding should be in the hands either of a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class. We accordingly are of opinion that the Magistrate had no jurisdiction in the present case to make over the enquiry as he did, and for these reasons the Rule must be made absolute. Fresh proceedings may be instituted if necessary.

A. T. M.

Rule made absolute.

CRIMINAL.

1929.

Ismaddar Ali

v.
Ismulla.

APPELLATE CIVIL.

*Before Sir George Claus Rankin, Knight, Chief Justice and
Mr. Justice M. N. Mukerji.*

NAFAR CHANDRA PAL CHOUDHURY AND ANOTHER

v.

JATINDRA NATH DAS AND OTHERS.*

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1929.
May, 29.

*Utbandi tenant—Suit for rent at rents agreed upon by all the utbandi tenants
—Decree for rent at fair and equitable rates, if can be passed—Bengal
Tenancy Act (VIII of 1885), Secs. 24, 153, 180, 180A, 180B.—Utbandi
rilyat acquiring occupancy right—Second appeal.*

There is nothing in section 180A or section 180B of the Bengal Tenancy Act which takes away the rights which are conferred by section 180 upon an utbandi rilyat who has acquired a right of occupancy and, even if resort is not made to the provisions of sections 180A and 180B for the purpose of fixing a uniform annual money rent in respect of utbandi lands, the general liability of an occupancy rilyat to pay a fair and equitable rent for the lands that he holds will accrue to a person who was in a position of an utbandi rilyat and has acquired a right of occupancy under the provision of section 180.

Where the suit instituted was one for recovery of rent at rents agreed upon by all the utbandi tenants and not for recovery of rent in accordance with the provisions of section 24 of the Bengal Tenancy Act, to have a decree for rent at fair and equitable rates, the plaintiffs would have to ask first of all for assessment of rent in a properly constituted suit with their co-sharers as parties.

Per Mitter J: Under section 153 of the Bengal Tenancy Act, a second appeal is entertained, as the Court determined what was the rate of rent payable in respect of certain classes of land: rent included money as well as paddy rent.

Appeal by the Plaintiffs.

Suit for rent.

The material facts appear from the following judgment of

D. N. Mitter, J: This is an appeal by the plaintiff landlords and arises out of suit for arrears of rent on Utbandi basis. The defence of the tenant in substance was that some of the lands were *Patit* or kicha or Asha lands during the period in suit that no rent was payable for *patit* lands and that the rate of rent for kicha lands was 8 annas and for Asha lands 6 pies per bigha. The

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*Letters Patent Appeal No. 10 of 1929, against the decision of Mr. Justice D. N. Mitter, dated the 29th November, 1928, in Appeal from Appellate Decree No. 190 of 1928, against the decision of Babu Ram Chandra Ghose, Subordinate Judge of Nadia, dated the 15th June, 1927, affirming that of Babu Jogesh Chandra Chatterjee, Munsiff of Meherpur, dated the 19th March, 1926.

Court of first instance held that the plaintiffs had failed to establish that defendants were liable to pay rent for lands kept *patit*. The lower appellate Court agreed with the Munsiff.

A second appeal has been taken to this Court by the plaintiffs landlords. The main contention before me has been that even if it were held that some lands remained *patit* or *khicha* or *Asha* during the years under claim the plaintiffs are entitled to full rate in respect of those lands inasmuch as the tenants have acquired a right of occupancy therein. It is to be noticed that this ground on which the plaintiffs sought to recover full rates of rent does not find place in the plaint. It is true that the question was raised in the course of argument in the Court of first instance.

A preliminary objection has been taken by the learned Advocate for the respondents to the hearing of this appeal and it is contended that as the tenancy is an *Utbandi* tenancy the provisions of section 153 of the Bengal Tenancy Act did not apply to such a case and that an appeal is not allowed by the proviso to section 153 as it cannot be said that there is any decision on any question of amount of rent annually payable. It is not disputed that the word "rent" under the Bengal Tenancy Act includes money as well as paddy rent and although the rent may vary still the Court has determined what is the rate of rent which is payable or as to whether the rent is payable in respect of certain classes of land or not. I do not think there is any substance in the preliminary objection.

With regard to the contention of the appellants that the tenants are liable to pay full rent as they have acquired rights of occupancy, in my judgment, section 180 (a) (b) of the Bengal Tenancy Act affords a complete answer. It is not disputed that in this case no order has been made yet under section 180 (a) determining a uniform annual rental for any land of the tenancy and section 180 (b) provides that it is only when such an order is made that such lands in respect of which an order has been made shall cease to be held as *Utbandi* lands with effect from the date from which new rent takes effect and the tenant shall hold them as occupancy raiyats from the date of the order. It is said on behalf of the respondents that it is open to the landlord to make an application under section 180 (a) cl. (a). I think the view taken by the lower appellate Court as to the effect of section 180 (a) is right and that the *Utbandi* conditions of the tenures still continue irrespective of whether occupancy right has or has not been acquired in

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Jatindra Nath Das.

D. N. Mitter, J.

this tenancy. It also appears from the deposition of plaintiff's Gomastha, his witness No. 2, that no rent is payable for *patit* lands in the Mouza irrespective of the time such lands are in possession of the tenant. It also appears from the evidence of plaintiff's witness No. 1 that the tenants never paid rent for the *patit* land before the Settlement operation. The learned Advocate for the respondents supports the judgment of the Court below also on the ground that there is a custom not to pay rent for *patit* lands as has been deposed to by the plaintiff's own witnesses and that irrespective of the time of the occupation of the lands by the tenant. Section 180 (a) and (b) have been added to the Bengal Tenancy Act by the Utbandi Amendment Act X of 1923. I do not think that the effect of the amendment is to interfere with any previous arrangement or custom that might have regulated the rights as between the landlord and the tenant. It is argued on behalf of the appellants that there would be considerable hardship if the landlord is not to get fair and equitable rent in respect of all lands although the defendants have acquired rights of occupancy in these Utbandi lands having regard to the provisions of section 24 of the Bengal Tenancy Act. It is contended on the other hand that ordinarily with regard to these Utbandi tenancies the rates are very high. In this connection reference is made by the learned Advocate for the respondents to a case in 3 W. R. Act X Rulings 159 to show that in the district from which this case comes Utbandi tenancies are granted at pretty high rates. I am not, however, concerned with the question as to whether the construction that has been put by the Courts below on section 180 (b) operates harshly on the plaintiff's landlords. The rights of the parties have to be regulated by the law although it may operate harshly on one party or another.

I think the Courts below have taken a right view. The appeal accordingly fails and must be dismissed with costs.

Against the decision, the plaintiffs appealed under cl (15) of the Letters Patent.

Messrs Amarendra Nath Bose and Radhika Ranjan Guha for the Appellants.

Messrs. Panchanan Ghose and Sitangshu Bhushan Basu for the Respondents.

The following judgments were delivered:

Mukerji, J.:—This appeal has arisen out of a suit for rent. The plaintiff's landlords are the appellants in the appeal. In order to appreciate the contentions that have been urged in the

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May, 29.

case, it is necessary to set out the pleadings somewhat in detail.

The plaintiffs instituted the suit for recovery of rent on the allegation that they were 12 annas 16 gandas co-sharer landlords and that the defendants were holding certain lands under them in utbandi system. In the plaint, certain rates were mentioned as being the rates of rent payable by utbandi tenants in respect of different kinds of land and a decree for rent was prayed for on the footing that separate collections used to be made on behalf of the plaintiffs from these defendants. The main defence of the defendants was to the effect that some of the lands in suit were *patit Khicha* and Asha lands, that no rent was payable for *patit* lands, that the rate for the *Khicha* lands was 8 annas per Bigha and that the rate for the Asha lands was 6 pies per Bigha. The trial Court held that the evidence that was produced on behalf of the plaintiffs for the purpose of establishing the rates at which they claimed rent in respect of the lands in suit was not satisfactory and, being of opinion that the defendants had succeeded in establishing that no rent was payable for the *patit* lands and that the rates for the *Khicha* and the Asha lands were what were stated in the written statement, the learned Munsiff gave the plaintiffs a decree on the defendants' admission. This decree was upheld on appeal by the learned Subordinate Judge and, on a second appeal being preferred to this Court, my learned brother Mr. Justice Mitter has affirmed that decision. The plaintiffs have thereupon preferred the present appeal under the Letters Patent.

Of the two grounds that have been urged in support of the appeal, one is to the effect that the plaintiffs are entitled to a decree for fair and equitable rent as against the defendants, inasmuch as the defendants by holding the lands for a continuous period of twelve years have acquired a right of occupancy and that, therefore, under the provisions of section 24 of the Bengal Tenancy Act, they are liable to pay a fair and equitable rent. This contention has been dealt with by my learned brother Mr. Justice Mitter as well as by the Courts below and has been held as being answered by the provisions of section 180A and 180B of the Bengal Tenancy Act. It appears that the suit was not based upon an allegation to the effect that the plaintiffs were entitled to get fair and equitable rent from the defendants inasmuch as they were no longer utbandi tenants but had acquired a right of occupancy. Such a contention did not appear in the pleadings and it was only at the time of the argument in the

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trial Court that it was put forward. The Courts below, however, have dealt with this matter and inasmuch as it has been argued before us, I may as well express my opinion upon it.

What is contended is that section 180 of the Bengal Tenancy Act states—and here I read only that part of the section which is relevant—“Notwithstanding anything in this Act, a raiyat who in any part of the country where the custom of utbandi prevails holds land ordinarily let under that custom and for the time being let under that custom shall not acquire a right of occupancy until he has held the land in question for twelve continuous years and, until he acquires right of occupancy in the land, he shall be liable to pay such rent for his holding as may be agreed on between him and his landlord”. It is contended that the section provides that an Utbandi raiyat shall not acquire a right of occupancy until he has held the land in question for twelve continuous years and that it further provides that until he acquires a right of occupancy in the land, he shall be liable to pay such rent for his holding as may be agreed on between him and his landlord; and it is said that from this it follows, in the absence of any other provision in the Act, that, when a right of occupancy is acquired by a raiyat who had been an Utbandi tenant, his status as well as all the other incidents of the tenancy are to be governed by those provisions of the Act which deal with occupancy riyats. This, in substance, is the contention that is urged on behalf of the appellants and, in support of this, what is stated is that, prior to the amendment introduced by Act X (B. C.) of 1923 which for the first time inserted section 180 A to section 180 C in the Tenancy Act, there was no provision in the Act which could regulate the rent etc. in respect of Utbandi riyats who had acquired a right of occupancy. Section 180, it is said, limits the liability to pay the agreed rent until such time as the right of occupancy is acquired by an Utbandi raiyat. Now, the Courts below appear to have been of the view that, inasmuch as section 180 A provides for an application to be made for the fixing of uniform annual money rent in respect of Utbandi lands either by the landlord or by the raiyat and inasmuch as section 180 B says that whenever an order under section 180 A is passed determining a uniform annual money rent for any lands such lands shall cease to be held as Utbandi lands with effect from the date from which the new rent takes effect and the tenant shall hold them as an occupancy raiyat from the date of the order, the effect of these provisions is to lay down that although under Section 180 a right of occupancy may be acquired

by an Utbandi raiyat, he is not liable to pay a uniform money rent or a fair and equitable rent until proceedings have been taken in accordance with the provisions of sections 180 A and 180 B of the Act. I am of opinion that this view is not sustainable. In my opinion, there is nothing in section 180 A or section 180 B which takes away the rights which are conferred by section 180 upon an Utbandi raiyat who has acquired a right of occupancy and, even if resort is not made to the provisions of section 180 A and section 180 B for the purpose of fixing a uniform annual money rent in respect of Utbandi lands, the general liability of an occupancy raiyat to pay a fair and equitable rent for the lands that he holds will accrue to a person who was in the position of an Utbandi raiyat and has acquired a right of occupancy under the provisions of section 180. This view, however, would not help the appellants in the present case, inasmuch as the suit that they instituted was not one for recovery of rent in accordance with the provisions of section 24 of the Bengal Tenancy Act but a suit for recovery of rent at rates agreed upon by all Utbandi tenants. To have a decree for rent at fair and equitable rates, the plaintiffs will have to ask first of all for assessment of rent in a properly constituted suit with their co-sharers as parties. In view of the nature of the claim that they had put forward, the question whether they are entitled to recover a fair and equitable rent is a question which cannot arise in the present case. Although, therefore, I am not prepared to agree with the view that the Courts below have taken as regards sections 180 A and 180 B of the Bengal Tenancy Act, I am clearly of opinion that the decree that has been passed in the present case is correct.

Another argument has been put forward to the effect that, in the judgment of my learned brother Mr. Justice Mitter, there is a passage indicating that the plaintiffs are not entitled to get any rent on account of the *patil* lands as it has been established that by custom such rent is not payable. It has been argued before us there is no evidence of a custom properly so called and that the question as to whether there has been a custom to the above effect is a question which was not gone into in any one of the Courts below. What appears, however, is that my learned brother Mr. Justice Mitter intended to mean that there was evidence to that effect and that it was proved by the plaintiffs' evidence that no rent was, in point of fact, realised on account of the *patil* lands. I am of opinion, therefore, that there is no substance in this contention.

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The result is that the appeal fails and is dismissed with costs.
Rankin, C. J.:—I agree.

A. T. M.

Appeal dismissed.

REFERENCE UNDER THE INCOME TAX ACT.

*Before Sir George Claus Rankin, Knight, Chief Justice,
Mr. Justice C. C. Ghose, and Mr. Justice
P. L. Buckland.*

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In Re MESSRS. MARTIN & CO. *

*Remand—Indian Income Tax Act (XI of 1922), Sec. 66(4)—Partners of two
firms—Same persons in same shares—Intention.*

Under section 66 cl. (4) of the Income Tax Act, the High Court sent back the case to the Commissioner for making clear the points upon which further findings are required at his hands.

The proposition that the same persons in the same shares cannot for income tax purposes be partners of two entirely separate firms is a highly abstract proposition.

There may be an entirely different firm. It may be composed of the same partners and it may be that the partners are interested in the same shares but as a matter of intention of the parties, an entirely different partnership.

Reference under section 66(2) of the Income Tax Act by the Commissioner of Income Tax.

Dr. Radhabinoda Pal for the Commissioner.

The following judgments were delivered :

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Rankin C. J.—In order to dispose of the questions referred to us, it is necessary that we should refer the case back to the Commissioner to make certain additions thereto or alterations therein as provided by clause (4) of section 66 of the Income Tax Act of 1922. The observations which I propose to make now are entirely directed to making clear, so far as I can, the points upon which further findings are required at the hands of the Commissioner.

It appears that there is a firm called Messrs. Martin and Company which is governed by certain Articles of Partnership

* Reference under section 66(2) of the Income Tax Act.

in writing. There seem to be three such documents. These documents have not been made part of the case stated. They ought to be made part of the case stated. It is not exactly clear to me whether as a result of these three documents that firm is shown to have had 7 partners or only 5. The documents will make that matter clear. In 1927, certain persons bought a business which was being carried on under the name and style of Burn and Company. From the documents which have been made part of the case, it would rather appear that the persons who bought that business were 5 in number, and it would further appear that these 5 persons became partners for a day at least with the original proprietors of the firm of Burn and Company. The terms upon which, the original proprietors having gone, the new proprietors were carrying on the business are defined in the document dated the 1st February 1929 by a reference to the documents which govern the firm of Messrs. Martin and Company. The words "so far as applicable to this present partnership" appear in the document of 1st February 1927. That is a matter which has not been discussed by the Commissioner in the case stated at all. That matter ought to be dealt with. He ought to give any facts in his judgment bearing upon the question as to the weight to be given to that reference in clause (3) of the agreement of the 1st February 1927.

Again, in the document of the 28th September 1927, which is an agreement to which the five purchasers to whom I have referred are parties, I find that in clause (4) two other people are suddenly described as partners. It seems to be necessary that it should be ascertained how that comes about. At the end of that clause, there is a statement to the effect that these two gentlemen being the senior Assistants are entitled in pursuance of the partnership deed of Messrs. Martin and Company to participate in the net profit of Burn and Company. The Commissioner ought to consider that, upon the question whether or not in substance and in truth the assets which had belonged to Burn and Company were being bought by the firm of Martin and Company or whether in substance and in truth there was an entirely different firm (it may be composed of the same partners and it may be that the partners were interested in the same shares but as a matter of intention of the parties, an entirely different partnership). The Commissioner has not found whether there is or is not truth in the statement which appears to have been the case of the assessors, that the firm of Burn and

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Company was bought not with any funds, belonging to the firm of Martin and Company at all but with other funds being the private property of the individual persons who were partners of Messrs. Martin and Company. A finding as to that is very necessary.

In remitting the case to the Commissioner, I would point out not by way of deciding this case but entirely for the guidance of the Commissioner that this case may ultimately have to be decided upon findings which do not at present appear in the case stated. The proposition that the same persons in the same shares cannot for Income Tax purposes be partners of two entirely separate firms is a highly abstract proposition. It may or may not be correct but I am not prepared as at present advised to proceed upon so very general a principle without a careful enquiry into the concrete case and into the matters above mentioned. It may turn out that the case depends on the question of fact whether the two firms were entirely separate—a question of fact including the question of intention. It is necessary that we should know whether in substance and in truth the partners as part of the business of Martin and Company bought up certain assets (in which case the fact that these assets went by a different name would have no importance whatever) or whether, on the other hand, it was an entirely separate venture not intended to be any part of the business of Martin and Company or to have any connection with Martin and Company. If the fact is that certain persons—be they 5 or 7 put their hands in their pockets to buy the assets of Burn and Company with the intention of running a firm which would have nothing to do with Messrs. Martin and Company, then the Commissioner should in justice to the assesses give a finding to that effect. Looking upon it in that way, it seems to me desirable that this case should be sent back to the Commissioner to make such additions thereto or alterations therein as are required to meet the points which in this judgment I have mentioned.

C. C. Ghose, J :—I agree.

Buckland, J :—I agree.

Messrs. Orr & Dignam : Attorneys for the Commissioner.

A. T. M.

Case sent back.

APPEAL FROM ORIGINAL CIVIL

Before Mr. Justice C. C. Ghose and Mr. Justice Pige.

CARR LAZARUS PHILLIPS AND OTHERS

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Suit, maintainability of—Suit by mortgagees against surety before realisation of debt—Duty of continuing guarantor—Construction—Surrounding circumstances—Intention of parties—Contingency—Amount for which surety is liable is less than the total debt—Right of surety to the benefit of security—Surety, when entitled to the security.

A guarantee is a contract to indemnify upon a contingency : *Exp. Gardom* (1) and *Sampson v. Burton* (2). A guarantee, like every other contract, must be construed reasonably ; it must not only be construed by the words used, but also with regard to the surrounding circumstances : *Lloyds v. Harper* (3). In other words, in construing a guarantee, one must look at, and is entitled to give in evidence, all the surrounding circumstances so as to know what the parties meant : *Head v. Grace* (4) per Pollock C. B. Where no oral evidence is given, the intention of the parties is to be gathered from the words used with the aid of such light on the surrounding circumstances as is afforded by the documents.

If the amount for which the surety is liable is less than the total debt owing to the creditor by the debtor, it is always necessary in bankruptcy to consider whether the surety is bound for the whole of that debt with a limitation of his liability or whether he is only bound for a part of it equal to the amount for which he is liable. If the former is the case, he has no right in bankruptcy to a dividend till the creditor has received twenty shillings in the pound on the whole. If the latter, he is relieved to the extent of the proportion of the dividend attributable to that part of the debt which he has guaranteed, just as if the amount he has guaranteed were a separate distinct debt from the rest of the creditors' claim.

The right of surety to the benefit of the security held by the creditor is derived from the obligation of the principal debtor to indemnify his surety : *Yonge v. Reynell* (5). But, a surety is not entitled to the securities which the creditor holds until he pays the entirety of the debt : *Exp. Brett. In re Howe* (6) and *Gedye v. Matson* (7).

One G, who was the owner of very considerable house and landed properties in and outside Calcutta, being in financial difficulties, applied to B for a loan

* Appeal from Original Decree No. 67 of 1929, against the decree of Mr. Justice Buckland, dated the 26th April, 1929, in Suit No. 1476 of 1928.

(1) (1808) 15 Ves. 286.

(2) (1820) 2 Brod & Bing. 89.

(3) (1880) 16 Ch. D. 290.

(4) (1861) 7 H & N. 494.

(5) (1852) 9 Hare 809 ; 68 E. R. 744.

(6) (1871) 6 Ch. App. 838.

(7) (1858) 25 Beav. 310.

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of 40 lacs of rupees. S borrowed from the Imperial Bank of India 40 lacs of rupees for the accommodation of G and the latter on receipt of the amount executed a mortgage on the 14th February, 1927, in favour of S for the purpose of securing the loan of 40 lacs undertaking to pay interest at the rate of 6 per cent per annum by equal monthly instalments with quarterly rests until payment. S agreed to obtain the said loan from the Imperial Bank of India at the request of the appellants and the latter guaranteed to S the payment by G of the said sum of 40 lacs of rupees to the limit of their aggregate liability to the extent of 18 lacs of rupees whereof each of the three defendants was to be liable for 6 lacs of rupees. Clause 3 of the deed of continuing guarantee provided "within the aforesaid limit of liability this guarantee shall extend to and be applicable to the whole debt that shall *ultimately* be due to you from the said John Caraplet Galstam in respect of such advance as aforesaid and not merely to so much whereof as shall be co-extensive with our aforesaid maximum liability thereunder." It was also agreed between S and the appellants that should the common liability be less than the said maximum aggregate sum of 18 lacs of rupees, the share due from each one of them in respect thereof should be in strict proportion to the individual liability of each of the appellants as referred to above.

S died on the 14th May, 1927 and the present plaintiffs were the executors and trustees under his will. On the 12th October 1927, the plaintiffs as such executors demanded from G immediate payment of the said sum of 40 lacs of rupees and of the interest thereon. G having failed to pay, the plaintiffs gave notice on the 15th October, 1927, to each of the present appellants of the fact of their having made the same demand on G. Thereafter on the 8th June, 1928, the plaintiffs demanded payment from each of the present appellants of the sum of 6 lacs of rupees due under and by virtue of the instrument of guarantee :

Held, construing the terms of the guarantee as a whole, the liability under the guarantee did not attach until the respondents have pursued their remedies under the mortgage, and if the proceeds of the sale were proved to be insufficient to satisfy G's outstanding indebtedness to S in respect of the loan.

Per C. C. Ghose, J : When the parties said that the guarantee should extend to and be applicable to the whole debt that should ultimately be due to S from G, they had not in their minds the peculiar rules in bankruptcy.

Per Fage, J : That the construction of the deed of guarantee was not free from difficulty. If the parties intended that the guarantee should only attach to the balance of the debt (if any) outstanding after the mortgaged properties, such intention should be expressed in precise and unambiguous terms. If the parties intended that the guarantors should forthwith become liable upon the failure of G to repay the loan it was unnecessary to make any reference to the mortgage in the guarantee, as the mortgage would be an independent collateral security upon the enforcement of which the liability of the guarantors in no way depended.

Appeal by the Defendants.

The material facts appear from above.

The suit was decreed by Buckland, J. by the following judgment :

Buckland, J.—The plaintiffs in this case are the executors and trustees of the will and estate of Arratoon Stephen who died on the 14th May 1927. There is no dispute about the facts. The late Arratoon Stephen on the 14th February 1927 advanced 40 lacs of rupees to Mr. J. C. Galstaun on a mortgage of various properties in or about Calcutta. A few days previously a letter of guarantee dated the 9th February 1927 had been addressed to Mr. Stephen by the defendants guaranteeing payment of the money so to be advanced to the extent of 18 lacs of rupees whereof each of the three defendants was to be liable for six lacs. On 15th October 1927 notice was given to the mortgagor to pay the amount due on the mortgage and on his default a notice dated the 8th June 1928 was given to the defendants requiring them to pay the amount guaranteed by the letter of 9th February 1927. The defendants are now sued on their guarantees.

On behalf of Mr. Phillips and Mr. Arratoon, the first and third defendants, the issues submitted are :

1. Was it agreed by the terms of the letter of guarantee dated 9th February 1927 that the defendants would only be liable for any deficiency after sale of the property mortgaged to secure the loan of 40 lacs by Stephen to Galstaun ?

2. Have the defendants been discharged from their liability under the said guarantee by the sub-mortgage dated the 14th February 1927 by Stephen in favour of the Imperial Bank ?

The second of these issues does not arise on the pleadings in any sense, but no objection has been taken to it by the learned Advocate-General on behalf of the plaintiffs and it sufficiently sets forth the facts necessary to raise the question of law involved.

On behalf of the second defendant, Mr. Creet, the issues submitted on behalf of the other defendants were adopted. Learned counsel who appeared for Mr. Creet, who had by the 7th and 8th paragraphs of his written statement indicated a defence apart from any question of the terms of the letter of guarantee stated that he abandoned anything based on agreement or understanding outside that letter. The case therefore resolves itself into a question of construction.

Questions which may arise where a surety gives a limited guarantee are considered in a passage in Lord Halsbury's Laws

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of England, Vol. XV, 475, to which the learned Advocate-General has drawn my attention. He has done so not for the purpose of assisting in the interpretation of this document but of explaining the reasons for its form. His submission is that what was intended by the letter of guarantee was to guarantee the whole of the mortgage debt but that the liability of each of the guarantors was to be limited to six lacs of rupees. If that is the correct view to be taken of the document, then he submits that immediately there has been default by the mortgagor Galstaun in paying the amount due upon the mortgage the plaintiffs are entitled to recover on the guarantee.

For the defendants it has been argued that if the document be taken as a whole it was clearly the intention of the parties that the guarantors should only be liable after the mortgagee had realised the security, that is to say, that they should only be liable as guarantors for any deficiency after a sale of the property mortgaged. If that view is correct they contend not only that they cannot be held liable upon the mortgagor's initial default but that they do not become liable until the deficiency has been ascertained and that the suit therefore is premature and must fail.

The document begins by reciting the reconsideration for the guarantee. As this recital requires examination for the purpose of deciding the second issue I may at once express my view of the meaning of this part of the document. It states that the consideration for the guarantee is that Stephen has agreed to obtain a loan of 40 lacs of rupees from the Imperial Bank of India for the benefit of Galstaun for the certain purposes. Then it goes on to say that such sum of 40 lacs of rupees shall bear interest and that repayment of such sum is to be secured by a mortgage. I pause here for the purpose of drawing attention to the fact that so far there has been no mention of an advance by any person but the Imperial Bank of India, and the mortgage so intended might be so assumed to be a mortgage to be executed in favour of the Imperial Bank. It is at all events clear so far that repayment of the loan by the Imperial Bank is to be secured by a mortgage. The next words explain that the mortgage intended is a mortgage to be executed by Galstaun in favour of Stephen of certain properties specified.

Here I will pause and proceed to a consideration of the remaining terms of the document and state later my view of the effect

as regards the second issue of the earlier portion of the document.

The defendants then proceed to guarantee payment by Galstaun of the 40 lacs of rupees to the limit of their aggregate and individual liability thereafter described. The effective part of the next paragraph, is as Mr. Ameer Ali stated, in the nature of the machinery to be employed, if the aggregate liability is less than 18 lacs, for the purpose of ascertaining how such liabilities shall be apportioned. It has been referred to in support of the point raised but subsidiarily to the argument based upon the third paragraph.

The third paragraph says: "Within the aforesaid limit of liability this guarantee shall extend to and be applicable to the whole of the debt that shall ultimately be due to you from the said Galstaun in respect of such advance as aforesaid and not merely to so much thereof as shall be co-extensive with our aforesaid liability thereunder. It has been argued that the words "the whole debt that shall ultimately be due to you" mean when everything has been done that can be done to realise the securities, that is to say, the final amount of the deficiency due after the securities have been sold.

Now if that were the intention I cannot imagine that anything would have been easier than to have said so by inserting some appropriate words such as "after realisation of the securities by sale" or in the other similar language. Because the draftsman has not inserted such words it may not necessarily follow that the paragraph has not that effect. But what is guaranteed is the whole of the mortgage debt of 40 lacs with interest, though to the limit of the individual liability prescribed; the guarantee nevertheless is for the whole amount. That appears to me to be the same thing as "the whole debt that shall ultimately be due" meaning the whole debt of 40 lacs with interest. The phraseology cannot be limited in its application to 40 lacs and interest on the one hand and the deficiency after sale of the securities on the other for the mortgage allows of a sale by the mortgagee of either all or a part of the property mortgaged. If from time to time the mortgagee had sold some of the properties this would very considerably affect the amount "ultimately due" upon the mortgage, and the expression "the whole debt that shall ultimately be due to you" would be appropriate to such conditions.

Then it has been argued that the words in paragraph 2 "should the common liability be less than the said maximum

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aggregate sum" also point to the liability arising after the deficiency on realisation has been ascertained, but this also is attributable to the right of the mortgagee to sell a portion of the property. The defendants' contention involves that the measure of their liability shall be the final result after the application of one of the remedies provided for a mortgagee by law and not the debt secured by the mortgage. In my opinion the guarantee applies to the debt secured by the mortgage. The deficiency after a sale has taken place in a mortgagee's suit for sale is a debt of different nature. In such circumstances the mortgage has become merged in the decree and the original debt has gone: *In re European Central Railway Co.* (1).

In my judgment the defendants are not entitled to say that they are only liable for the deficiency after the property mortgaged has been brought to sale, and upon the construction of this document all that is necessary for the plaintiffs to establish to enforce their liability is that there has been default by Galstaun in payment of the mortgage debt.

I now pass on to the other issue. I have stated my view as to the meaning of the first part of the letter of guarantee, from which it follows that the loan by the Bank for the benefit of Galstaun can only be secured by the mortgage by Galstaun in favour of Stephen if Stephen gives the Bank the benefit of that security. In this view no question of law such as is put forward on behalf of the defendants arises. The proposition is based upon the right of a surety to have the securities kept intact. It was not suggested that the defendants would be entitled to the securities until the mortgage debt of 40 lacs had been fully paid, but as a proposition of law it was submitted that by reason of the sub-mortgage to the Imperial Bank the security had been impaired to the detriment of the defendants. In my judgment this point does not arise because it is clear that what was contemplated to the knowledge of the defendants was a loan by the Imperial Bank for the benefit of Galstaun, though such loan had to pass through the medium of Stephen there being mortgage transactions on either side. That according to my view is what was intended and what actually according to the accepted facts took place, and in the circumstances the defendants have no cause of complaint and can not claim to have been discharged.

There will therefore be judgment against each defendant for six lacs of rupees, and judgment against them jointly and severally

for the costs of the suit on scale No. 2. Interest on judgment at six per cent.

Against this decision, the defendants appealed.

Messrs. L. P. E. Pugh, S. N. Banerjee and T. Ameer Ali for the Appellants.

Messrs. N. N. Sircar (Advocate-General) and S. M. Bose for Respondents.

The following judgments were delivered :

C. C. Ghose J :—In my opinion this appeal should be allowed and I will state my reasons.

The facts involved in this appeal, shortly stated, are as follows : One J. C. Galstaun, who is the owner of very considerable house and landed properties in and outside Calcutta, was in financial difficulties in the early part of 1927. There were several decrees against Galstaun and he was unable to satisfy the same. He applied to one Arrathoon Stephen for a loan of Rs. 40,00,000 to enable him to pay off the amounts of the said decrees as well as certain other liabilities. Stephen borrowed from the Imperial Bank of India a sum of Rs. 40,00,000 for the accommodation of Galstaun and the latter on receipt of the amount executed a mortgage on the 14th February 1927 in favour of Stephen for the purpose of securing the loan of Rs. 40,00,000 undertaking to pay interest at the rate of 6 per cent per annum by equal monthly instalments with quarterly rests until payment. Stephen it appears, agreed to obtain the said loan of Rs. 40,00,000 from the Imperial Bank of India at the request of the appellants and the latter guaranteed to Stephen the payment by the said J. C. Galstaun, of the said sum of Rs. 40,00,000 to the limit of their aggregate liability to the extent of Rs. 18,00,000 and of their individual liability of Rs. 6,00,000. It was also agreed between Stephen and the appellants that should the common liability be less than the said maximum aggregate sum of Rs. 18,00,000, the share due from each one of them in respect thereof should be in strict proportion to the individual liability of each of the appellants as referred to above. The guarantee was as follows:—

To Arrathoon Stephen,
s, Camac Street,
Calcutta.

"In consideration of your having at our request agreed to obtain a loan of Rupees forty lakhs bearing interest at six per cent per annum from the Imperial Bank of India for the sole

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benefit of John Carapiet Galstaun for the purpose of satisfying certain decrees and paying certain pressing debts such sum of Rupees forty lakhs to bear interest at the rate aforesaid and the repayment thereof to be secured by a mortgage to be executed by the said John Carapiet Galstaun in your favour of the properties included in the mortgages held by Framroz Edulji Dinshaw and a second mortgage of the properties included in the mortgage executed by the said John Carapiet Galstaun in favour of the Prudential Assurance Co. Ltd. We the undersigned Carr Lazarus Phillips of No. 33, Alipore Park Road, Alipore, Arathoon Mackertoom Arathoon of No. 3 Rawdon Street, in Calcutta, and Arathoon Theodore Creet of Ghusick Colliery in the District of Rancoogunge, hereby guarantee to you the payment by the said John Carapiet Galstaun of the said sum of Rupees forty lakhs to the limit of our aggregate and individual liability hereinafter prescribed.

"2. This guarantee shall be a continuing guarantee, but our aggregate liability thereunder shall not under any circumstances exceed the sum of Rupees eighteen lakhs and the liability of each of us individually in respect of the said sum shall not exceed the sum of Rupees six lakhs, being the sum placed opposite our respective signatures at the foot hereof and should the common liability be less than the said maximum aggregate sum, the share due from each one of us in respect thereof shall be in strict proportion to his individual liability hereunder and not otherwise.

"3. Within the aforesaid limit of liability this guarantee shall extend to and be applicable to the whole debt that shall ultimately be due to you from the said John Carapiet Galstaun in respect of such advance as aforesaid and not merely to so much thereof as shall be co-extensive with our aforesaid maximum liability hereunder.

"4. You shall be at liberty without discharging us from liability hereunder to grant time or other indulgences to the said Carapiet Galstaun and to accept payment from him in cash or by means of negotiable instruments or otherwise.

Dated at Calcutta this ninth day of February one thousand nine hundred and twenty seven.

Signature of Sureties.

(Sd) C. L. Philips. Amount guaranteed.—Rupees six lakhs.

(Sd) A. T. Creet. Amount guaranteed.—Rupees six lakhs.

(Sd) A. M. Arathoon. Amount guaranteed.—Rupees six lakhs."

Stephen died on the 14th May 1927 and the present plaintiffs are the executors and trustees under his Will. On the 12th October 1927, the plaintiffs as such executors demanded from Galstaun immediate payment of the said sum of Rupees forty lakhs and of the interest due thereon. Galstaun having failed to pay, the plaintiffs gave notice on the 15th October 1927 to each of the present appellants of the fact of their having made the said demand on Galstaun. Thereafter on the 8th June 1928, the plaintiffs demanded payment from each of the present appellants of the sum of Rupees six lakhs due under and by virtue of the said instrument of guarantee. The present appellants having failed to pay, the plaintiffs instituted the present suit.

The defendants filed three separate written statements ; but the main contention on their behalf was that upon a true construction of the said instrument of guarantee it should be held that each of the defendants was liable to the plaintiffs for such sum only as might ultimately be due from Galstaun after realisation of the securities mentioned in the mortgage by Galstaun in favour of Stephen, such liability of each of the defendants in no event to exceed the sum of Rupees six lakhs, and that the realisation of the securities mentioned in the mortgage executed by Galstaun in favour of Stephen was a condition precedent to the arising of any obligation or liability under the instrument of guarantee. There was another contention raised at the hearing before Mr. Justice Buckland being the second issue, but Mr. Pugh, who appeared for the appellants before us, did not press the same.

Mr. Justice Buckland held that the defendants were not entitled to say that they were only liable for the deficiency after the properties mortgaged by Galstaun in favour of Stephen had been brought to sale and that upon the construction of the said instrument of guarantee all that was necessary for the plaintiffs to establish to enforce liability against the defendants was that there had been default by Galstaun in payment of the mortgage debt. It is against this judgment that the present appeal has been brought.

It appears that along with their written statements, the defendants filed a suit in this Court being Suit No. 2285 of 1928 against the plaintiffs and the said Galstaun (See page 29 of the paper book) in which they contended that the defendants in the said suit other than Galstaun (i.e. the present plaintiffs) were bound to realise the securities under the mortgage by Galstaun in favour of Stephen and to apply the proceeds in satisfaction of their claims to the

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extent of the liability mentioned in the said instrument of guarantee and further in the alternative that the plaintiffs were bound to hold as trustees and on behalf of the present appellants any surplus. The said suit, we are informed, is still pending in this Court. It may be stated in passing that the present plaintiffs filed a suit in this Court being Suit No. 664 of 1929 on the 8th April 1929 against Galstaun on the mortgage dated the 14th February 1927.

A guarantee, like every other contract, must be construed reasonably; it must be construed by the words used, but also with regard to the surrounding circumstances: See *Lloyds v. Harper* (1). In other words, in construing a guarantee you must look at, and are entitled to have given in evidence, all the surrounding circumstances so as to know what the parties meant [Per Pollock C. B. in *Head v. Grace* (2)]. In this case, no oral evidence was adduced by the appellants before Mr. Justice Buckland; and we are therefore left to gather the intention of the parties from the words used with the aid of such light on the surrounding circumstances as is afforded by the documents printed in the paper book. Now, as will be seen from the instrument of guarantee, the appellants requested Stephen to find the money from the Imperial Bank of India for the benefit of Galstaun and their idea was that Stephen was to be secured by a mortgage by Galstaun in his favour of certain immovable properties belonging to Galstaun. The instrument of guarantee is dated the 9th February 1927 and it appears that the mortgage by Galstaun in favour of Stephen was not executed till the 14th February 1927. Galstaun undertook to pay to Stephen on demand the said sum of Rupees forty lakhs. According to the plaintiffs, demand was made on Galstaun and Galstaun failed to pay, and that, thereupon the plaintiffs' cause of action against the defendants arose.

A guarantee is a contract to indemnify upon a contingency [*Exp. Gardom* (3); *Sampson v. Burton* (4)] and the whole point in this case is what was the contingency which the parties had in their minds when the instrument of guarantee was executed. It is no doubt true that Galstaun undertook to repay the said sum of Rupees forty lakhs *on demand*; but it could not have been the intention of the parties that immediately on the execution of the mortgage, demand would be made on Galstaun and that on Galstaun's failure to pay, the defendants would be forthwith called

• (1) (1880) 16 Ch. D. 290.

(2) (1861) 7 H. & N. 494.

(3) (1808) 15 Ves. 286.

(4) (1820) 2 Brod. Bing. 89.

upon to meet their liabilities under the instrument of guarantee. There would be no sense in an arrangement like this. The defendants executed the instrument of guarantee, relying on the fact that the repayment of forty lakhs to Stephen was to be secured by a mortgage of certain immovable properties which was to be executed by Galstaun in favour of Stephen. Was that mortgage to count for nothing? In these circumstances, I entertain no doubt whatsoever that the intention of the parties was that the security specified in the mortgage which was to be executed by Galstaun should be realised first and in the event of a deficiency, the defendants were to be called upon to meet their liabilities as specified in the said instrument of guarantee.

I lay very considerable stress on the word 'ultimately' used in clause 3 of the letter of guarantee. I am aware that this clause was inserted by the lawyers because of the apprehension felt by them that Galstaun might be adjudged a bankrupt and in that event, for the purpose of securing in an effective manner the right of the creditor to retain certain dividends in bankruptcy. If the amount for which the surety is liable is less than the total debt owing to the creditor by the debtor, it is always necessary in bankruptcy to consider whether the surety is bound for the whole of that debt with a limitation of his liability or whether he is only bound for a part of it equal to the amount for which he is liable. If the former is the case, he has no right in bankruptcy to a dividend till the creditor has received twenty shillings in the pound on the whole. If the latter, he is relieved to the extent of the proportion of the dividend attributable to that part of the debt which he has guaranteed, just as if the amount he has guaranteed were a separate distinct debt from the rest of the creditors' claim. It is usual, for instance, in guarantees taken by banks to insert a clause providing that the bank may prove for its own benefit and that the guarantee is to stand security for the ultimate balance. This principle is exemplified in a long series of cases referred to in *Ellis v. Emmanuel* (1) (See 15 Halsbury 481). To put it in plain words, the question which has arisen in bankruptcy is whether the guarantor means "I will be liable for Rs. 100 of the amount which A. B. shall owe you" or "I will be liable for the amount which A. B. shall owe you subject to this limitation, that I shall not be called upon to pay more than Rs. 100".

Each case must depend upon its own facts and in deciding the point in issue in this case, it is not necessary in my opinion to go

(1) (1876) L. R. 1 Ex. D. 157.

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into a discussion about the rules which prevail in bankruptcy and to attribute a peculiar meaning to the word, 'ultimately'. I think on the whole, when the parties said that the guarantee should extend to and be applicable to the whole debt that should ultimately be due to Stephen from Galstaun, they clearly had not in their minds the peculiar rules in bankruptcy, but that their intention was that the securities mentioned in the mortgage by Galstaun in favour of Stephen should be realised first and that the guarantee given by the present appellants should only come into play in the event of a deficiency. The surety may, no doubt, be sued in the first instance and it may be said that the surety, if he pays the creditor is not without his rights. The right of surety to the benefit of the security held by the creditor is derived from the obligation of the principal debtor to indemnify his surety [*Yonge v. Raymond* (1)]. But a surety is not entitled to the securities which the creditor holds until he pays the entirety of the debt: *Re: Howe, Exp. Brett* (2); *Gedye v. Matson* (3). In other words not until the sureties in the present case have paid off the entirety of the mortgage debt due to Stephen, would they be entitled to the securities which Stephen held i.e., even if the sureties paid off a sum of Rupees eighteen lakhs, they would not be entitled to the said securities until the balance of forty lakhs was realised. The sureties would, in such a case, be without any security whatsoever during the interval. Could they have intended that such circumstance should intervene? I answer 'no'. In this case you have the further fact that a suit to enforce the mortgage in favour of Stephen has already been instituted; it was instituted before the present suit came on for trial and one may not unreasonably conclude that the intention of the parties was as I have attempted to state. In my view the present suit is premature and that this appeal should be allowed. The appeal will be allowed with costs and the suit should stand dismissed with costs.

Page, J.:—I have arrived at the same conclusion, but only after much consideration, for, in my opinion, the construction of this guarantee is not free from difficulty.

If, as the appellants urge, the parties intended that the guarantee should only attach to the balance of the debt (if any) outstanding after the mortgaged properties had been sold, I agree with Buckland, J., that one would expect to find such an intention expressed in precise and unambiguous terms. That,

(1) (1852), 9 Haro, 809; 68 E. R. 744.

(2) (1871) 6 Ch. App. 838.

(3) (1856) 25 Beav. 310.

however, has not been done. On the other hand, if it had been intended that the guarantors should forthwith become liable upon the failure of Galstaun to repay the loan it was unnecessary to make any reference to the mortgage in the guarantee, as the mortgage would be an independent collateral security upon the enforcement of which the liability of the guarantors in no way depended. Indeed, if the construction for which the respondents contend is correct it would follow that the day after the mortgage had been executed, Stephen would have been entitled to demand repayment from Galstaun, and upon his default to claim immediate payment of the loan from the guarantors.

Thus the substance of the transaction would be that the guarantors would be responsible for the loan to the extent of 18 lakhs without any security to which they could have immediate recourse, while Stephen would be responsible for 22 lakhs only the repayment of which was secured by the mortgage; for, although, the guarantors upon honouring the guarantee would obtain as against Galstaun a co-extensive charge upon the mortgaged properties nevertheless until the whole of the indebtedness of Galstaun to Stephen in respect of the loan had been satisfied the guarantors would be precluded from enforcing the charge which had accrued to them upon the properties that had been mortgaged: *Gedye v. Matson* (1).

That the guarantee would create such a situation, in my opinion, was neither intended nor contemplated. Indeed, the intention of the parties to the transaction becomes manifest from a perusal of the terms of the guarantee and the mortgage.

It appears that Stephen had been persuaded at the instance of the appellants to advance 40 lakhs at 6% interest to Galstaun, "the repayment thereof to be secured by a mortgage to be executed" by Galstaun in favour of Stephen of the properties referred to in the guarantee. Stephen, however, would seem to have been uncertain whether the mortgaged properties would prove to be sufficient to cover the loan, and it was to meet that possible contingency that the appellant contended within the limits specified in the guarantee to become responsible for making good the balance of the debt outstanding after realisation of the mortgaged properties. It was provided that the guarantee should be a continuing one, and it was obviously contemplated that from time to time certain of the mortgaged properties might be sold, and that Galstaun himself might repay instalments of the loan.

(1) (1858) 25 Beav. 310.

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It was for the repayment of the whole debt outstanding after giving credit for the sums so realised that it was intended that the guarantors should make themselves responsible and under clause (3) in the event of Galstaun becoming insolvent the guarantors would not be able to obtain any dividend out of Galstaun's estate in respect of any payment they had made until the whole of the indebtedness of Galstaun to Stephen had been satisfied. [*Hobson v. Bass* (1)]. That such was the intention of the parties to this transaction is not, I think, open to doubt, but the question is whether, having regard to its true construction, effect was given to such intention in the form of guarantee that was signed. In my opinion it was. The fact that [it was made part of the consideration for the guarantee that the repayment of the loan should be secured by the mortgage supports the view that we take of this instrument, and unless and until Galstaun executed the mortgage the guarantee would not become operative. But how is that consistent with the construction for which the respondents contend, namely, that on Galstaun's default in repaying the loan on demand the guarantors automatically became liable under the guarantee without reference to, and independent of, any rights that Stephen might have acquired under the mortgage or any other collateral security? And the construction which we are disposed to put upon this guarantee is further borne out by the language in which clause 3 is couched. To what debt was the guarantee to extend? Why, "the whole debt that shall ultimately be due to you from the [said] John Carapiet Galstaun in respect of such advance as aforesaid." What was "such advance as aforesaid?" The advance the repayment of which was to be secured by the mortgage. What is the meaning of "the whole debt that shall ultimately be due?" Surely, the balance of the advance that shall remain unpaid after giving credit for any sums repaid by Galstaun and the proceeds of the sale of the mortgaged properties by which the repayment was to be secured. What other meaning can be attributed to these words? I cannot persuade myself that the phrase "the whole debt that shall ultimately be due" is an apt expression merely to denote the whole debt of 40 lacks with interest.

Construing the terms of this guarantee as a whole I am of opinion that liability under the guarantee does not attach until the respondents have pursued their remedies under the mortgage, and it is proved that the proceeds of the sale of the mortgaged

properties are insufficient to satisfy Galstaun's outstanding indebtedness to Stephen in respect of the loan.

For these reasons, I agree that the appeal should be allowed and the suit dismissed with costs.

Leslie and Hinds : Attorneys for the Appellants.

A. N. Sil : Attorney for the Respondents.

A. T. M.

Appeal allowed : Suit dismissed.

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APPELLATE CIVIL.

Before Mr. Justice C. C. Ghose and Mr. Justice Sukumari.

SURENDRA NATH CHOUDHURI AND OTHERS.

v.

BARISAL LOAN COMPANY LIMITED.*

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July, 31.

Suit, maintainability of—Suit for recovery of possession in default of redemption—Limitation Act (IX of 1908), Sch. I Art. 137—Adverse possession against the mortgagor before execution of mortgage—Mortgagee, if affected by adverse possession.

Adverse possession against the mortgagor does not affect the right of the mortgagee when it commences after the mortgage but the rule does not apply if it had begun before the mortgage.

The mortgage by the mortgagor does not stop running the time against him or any one claiming through him.

Defendants Nos. 5 and 6 were the holders of a Nimhowla right in certain property under the Howladar B. B obtained a rent decree against defendants Nos. 5 and 6, and in execution of his decree, he purchased the Nimhowla in question on the 15th April, 1906, but never obtained possession and the defendants Nos. 5 and 6 remained in possession. On the 14th March, 1908, B mortgaged the said Nimhowla to the plaintiff company. At the time of mortgage, B was not in possession of the mortgaged property and defendants Nos.

*Appeal from Appellate Decree No 2599 of 1926, against the decree of R. L. Sadhu Esq., Additional District Judge, 1st Court, of Bakarganj, dated the 14th August, 1926, modifying that of Babu Grijia Bhushan Sen, Additional Subordinate Judge, of Bakarganj dated the 12th January, 1925.

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5 and 6 were in adverse possession. The date of payment under the mortgage was sometime in May, 1908. On the 12th March, 1909, defendants Nos. 5 and 6 made an application under O. 21 R. 90 of the Code of Civil Procedure for setting aside the sale of the Nimhowla. No notice was served upon the plaintiff company under O. 21 R. 92 of the Code of Civil Procedure. Meanwhile B had instituted a rent suit against F and others in respect of a Miras Karna under the Nimhowla and in execution of his decree in that suit, the defendants Nos. 5 and 6 purchased the Miras Karna. On the 10th April, 1910, the said defendants Nos. 5 and 6 sold the Miras Karna to P, a benamidar of defendants Nos. 1 to 4. On the 12th April, 1910, the sale of the Nimhowla in execution of rent decree obtained by B was set aside as a result of a compromise. In 1914, the plaintiff company, not being aware that the defendants Nos. 5 and 6 or the defendants Nos. 1 to 4 had any interest whatsoever in the mortgaged property in question, brought a suit against B under the mortgage and obtained a decree in execution of which the property in question was purchased by the company on the 18th July, 1916 and they obtained symbolical possession of it. The plaintiff company brought a rent suit in 1921 against defendants Nos. 5 and 6 in respect of the Miras Karna held under the said Nimhowla. The suit was dismissed. The plaintiff became aware of the interest of the defendants Nos. 1 to 6 in 1921. The plaintiff company then instituted the present suit on the 14th December, 1921, for recovery of possession of the property in question subject to the right of redemption of the parties who had not been joined in the suit on the mortgage.

Held, that though the suit was maintainable in the present form, it was barred by limitation, as the time had begun to run against the plaintiff company from the date of B's purchase, viz on the 15th April, 1906.

Appeal by the Defendants Nos. 1 to 3.

The material facts were stated above.

Mr. Sarat Chandra Roy Choudhuri (with *Mr. Nilkanta Ghose*) for the Appellants: A suit for possession subject to the right of redemption of the parties excluded in the previous mortgage suit is not maintainable in a case when the equity of redemption is entirely unrepresented as in the present case: See *Digambar Suthar v. Swajan* (1). The cases relied on by the lower Courts viz, *Durga v. Dukhi* (2); *Gangadas v. Jogendra* (3); *Jugdeo v. Habibulla* (4) and *Krishnapada Roy v. Chaitanya* (5) are all distinguishable as in those cases only a portion of the equity of redemption was left out. Moreover in the case of *Krishnapada Roy v. Chaitanya Charan Mandal* (5) Suhrawardy J. expressed a doubt as to whether such suits do lie

(1) (1928) 33 C. W. N. 100.

(2) (1905) 9 C. W. N. 789.

(3) (1907) 11 C. W. N. 403.

(4) (1907) 12 C. W. N. 107.

(5) (1922) 1. L. R. 49 Calc. 1048.

at all. The suit not having been brought within 12 years from due date is not at all maintainable.

The order for setting aside sale not having been set aside in any appropriate proceedings, stands valid and is binding on the mortgagee purchaser.

At any rate, the mortgagor being out of possession since before the mortgage, adverse possession ran against him, which is also adverse possession against the mortgagee: *Priyasakhi v. Bireswar* (1). Art 137 of the Limitation Act applies in this case, and the suit not having been brought within 12 years from the date when the judgment-debtor was first entitled to possession, it is hopelessly barred.

Mr. Brojendra Nath Chatterjee (with *Mr. Indu Bhusan Roy*) for the Respondents.

No question of limitation can arise in this case. Adverse possession against mortgagor is not adverse possession against the mortgagee.

Art 137 of the Limitation Act cannot apply in the present case: See *Sundaram Aiyar v. Thiyagaraja Pillai* (2).

All the cases in Calcutta have consistently held that a suit for possession subject to the right of redemption of the parties excluded, is maintainable, and the period of limitation commences to run from the date of auction purchase and not from the due date of the mortgage bond. I rely upon the cases cited by the Courts below.

The following judgments were delivered:

Suhrawardy, J.—The facts involved in this appeal, shortly stated, are as follows: The defendants Nos. 5 & 6 were the holders of a Nimhowla right in a certain property described as property No. 1 under the Howladar one Bepin Bahary Ghose on the basis of a kabulliat dated the 13th Chaitra 1301 B. S. Bepin was defendant No. 49 in this suit and he died during the pendency of the suit. It appears that Bepin obtained a rent decree against defendants Nos. 5 and 6 and in execution of the said decree, he purchased the Nimhowla in question on the 15th April 1906. On the 1st Chaitra 1314 B. S. corresponding with the 14th March 1908, Bepin mortgaged property No. 1 and certain other properties to the plaintiff company. The date of repayment under the mortgage was some time in May 1908. On the 12th March 1909, the defendants 5 and 6 made an application under Order 21, rule 90 Civil Procedure Code for setting aside the sale of the Nimhowla.

(1) (1916) 21 C. W. N. 177 (181, 186).

(2) (1922) 50 M. L. J. 183.

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Meanwhile it appears that Bepin had instituted a rent suit against one Felu and others in respect of a Miras Karsa under the Nimhowla and that in execution of the decree in the said rent suit, the defendants 5 and 6 purchased the Miras Karsa in question. On the 10th April 1910, the said defendants 5 and 6 sold the Miras Karsa to one Purna Chandra Sen, who, it is said, was the Benamidar of defendants 1 to 4. On the 12th April 1910 the sale of the Nimhowla in execution of the rent decree obtained by Bepin was set aside. It is said that it was set aside as a result of a compromise. In 1914, the plaintiff company brought a suit against Bepin on the mortgage and obtained a decree in execution of which the property in question was purchased by the Company. It is stated that symbolical possession was taken by the plaintiff company. The plaintiff company brought a rent suit in 1921 against defendants Nos. 5 and 6 in respect of a Miras Karsa held under the said Nimhowla. The suit was dismissed.

The plaintiff company allege that they came to know for the first time in that suit in 1921 that on the 14th April 1910, the sale of the Nimhowla in execution of the rent decree referred to above had been set aside. The plaintiff company was not made a party to the proceedings for the setting aside of the sale and as they did not know of these proceedings, the defendants 5 and 6 and the other defendants who had purchased their interest were not made parties by the plaintiff company to the suit on the mortgage. The present suit has been brought by the plaintiff company for recovery of possession of the property in question subject to the right of redemption of the parties who had not been joined in the suit on the mortgage.

The defendants 1 to 4 as stated above, are the purchasers of the Nimhowla from the defendants Nos. 5 and 6 in the benami of one Purna Chandra Sen and the main point taken in the written statement on their behalf was that the suit was barred by limitation. The Trial Court decreed the suit. There was an appeal to the lower Appellate Court but the appeal was dismissed subject to certain modifications regarding the amount of redemption. Thereafter the defendants 1 to 3 have preferred the present appeal.

Two questions have been argued before us, (1) that the present suit is not maintainable and (2) that it is barred by limitation, it having been instituted on the 14th December 1921 i. e. more than 12 years from the due date of payment under the mortgage in favour of the plaintiff. When the matter came before us in

the first instance on the 12th December 1928, we were of opinion that it was necessary that findings should be arrived at by the lower Appellate Court on two questions, i. e. (1) whether the appellants were aware of the mortgage in favour of the plaintiff company at the time when they had the sale of the Nimhowla set aside and, (2) whether the proceedings leading up to the setting aside of the rent sale on the 12th April 1910 by compromise were fraudulent. The lower Appellate Court has now recorded its findings on the two points mentioned above and is of opinion that the appellants were not aware of the mortgage at the time when they had the sale of the Nimhowla set aside and that the proceedings leading up to the setting aside of the rent sale on the 12th April 1910 were not fraudulent.

There can be no doubt on the facts of this case as set out in the judgments of the two Courts below that no notice was served upon the plaintiff Company under Order 21, rule 92, Civil Procedure Code in the matter of the proceedings for the setting aside of the sale of the Nimhowla. Further it has been found that the plaintiffs were not aware before they instituted their suit on the mortgage (which resulted in a decree in their favour and in execution whereof the properties in question were purchased by them on the 18th July 1916) that the defendants 5 & 6 or the defendants 1 to 4 had any interest whatsoever in the mortgaged property. Further, the evidence is that not until the suit in 1921 referred to above, did the plaintiff company become aware at any time of the interest of the said persons. In these circumstances I entertain no doubt whatsoever that the present suit for recovery of possession subject to the right of redemption of the defendants concerned is maintainable. The cases on this point are to be found referred to in the judgments of the two Courts below and it will serve no useful purpose if I were to go through them once again.

The next question is whether limitation should run from the 18th July 1916, the date of the plaintiff's purchase or from the 15th April 1906, the date of Bepin's purchase of the Nimhowla. Courts below have held that limitation should run from the date of the plaintiff's purchase. The learned Subordinate Judge observes that the plaintiff having come to know of the interest of the defendants Nos. 1-4 in the rent suit of 1921 and that adverse possession against the mortgagor is of no avail against the mortgagee, time against the plaintiff should be computed from the date of the purchase and not from the due date fixed by the mortgage.

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The proposition of law as stated by the Subordinate Judge is correct but in my judgment it is not applicable to the facts of this case. It has been found that since his purchase in 1906 Bepin never obtained actual possession and it must be considered that the defendants remained in adverse possession of the Nimhowla; so that when Bepin mortgaged the Nimhowla to the plaintiff Company, Bepin was not in possession of the mortgaged property and the defendants were in adverse possession thereof. The mortgage by Bepin did not stop running of the time against him or any one claiming through him. One test may be usefully applied in determining this question. If Bepin had not mortgaged the Nimhowla to the plaintiff Company, could he have succeeded in a suit for possession brought in December, 1921 (the date of the institution of the present suit)? The answer must be in the negative. There is no reason why his mortgagee or any person claiming through him should acquire a higher right or an act by him creating an interest in the property of which he is not in possession should stop the running of limitation in contravention of section 9 of the Limitation Act or create a fresh terminus. Adverse possession against mortgagor does not affect the right of the mortgagee when it commences after the mortgage but this rule does not apply if it had begun before the mortgage which was effected when the mortgagor was not in possession.

In the above view the plaintiff's suit must be held to be barred by limitation. The appeal accordingly succeeds, decrees of the Courts below are set aside and the plaintiff's suit is dismissed with costs throughout.

C. C. Ghose J: I agree.

A. T. M.

Appeal allowed.

Before Mr. Justice B. B. Ghose and Mr. Justice N. K. Bose.

ANANTA LAL PAKRASI

v.

JNANADA SUNDARI DEBYA AND OTHERS.*

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June, 26.

Award—Agreement—Decision of majority—Incomplete award may be affirmed—Waiver.

According to agreement though a decision arrived by the majority of the arbitrators would be a good one, the arbitrator, who did not join in the award prepared by the majority must act in the matter of arbitration. In the present case the provision as regards the arbitrators acting together may be construed as a provision for the event of all the arbitrators not acting in the matter of arbitration.

If an award is incomplete, the parties may affirm and may agree that that incomplete award would be binding upon them : *Mahend v. Salig Ram* (1) and *Suenendra v. Sures* (2).

Even if the parties had appointed quite a different set of arbitrators agreeing to abide by the previous award and asking them to complete the work done by the previous arbitrators, the previous award should be considered as affirmed by the parties and they would not be allowed to attack the award on the ground that it was incomplete.

Having acted in accordance with the award, a party cannot turn round and say that the award is invalid, unless he can prove that he was acting under some misapprehension.

No person can affirm in part an award and then repudiate in part. He must either accept the whole or repudiate the whole.

If there had been any illegality in the award, that can be waived by the conduct of a party : *Hurrybus v. Jehurmull* (3).

Appeal by the Defendant.

The material facts appear from the judgment.

Messrs. Hira Lal Chuckerbutty, Satindra Nath Khasnavis and Jitendra Mohan Banerjee for the Appellant.

Messrs. Romesh Chandra Sen, Porosh Chandra Sen and Amiya Kumar Shome for the Respondents.

* Appeal from Original Decree No. 152 of 1927, against the decision of Babu Sami Kumar Ghose, Subordinate Judge, and Court, of Pabna, dated the 6th April, 1927.

(1) (1894) L. R. 21 I. A. 47 ; L. L. R. 21 Calc. 590.

(2) (1927) I. L. R. 6 Pat. 556.

(3) (1929) 33 C. W. N. 711 (713.)

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The following judgments were delivered :

B. B. Ghose, J. :—This is an appeal by the defendant against an order of the Subordinate Judge of Pabna filing two awards dated the 9th March 1926 and 3rd July 1926 on the application of the respondents. It appears that seven persons were entitled to properties, movable and immoveable, of considerable value. Apparently they were not all on very good terms. On the 12th February 1926 an Achalnama was executed by all the seven persons appointing five gentlemen as arbitrators for settling their disputes, the subject matter of which was entered in a schedule attached to the said Achalnama. It was provided that even if all the arbitrators did not join, the decision which a majority of them would jointly come to would prevail. One of the arbitrators named did not act but four of them made an award dated the 7th March 1926. Under that award all the matters in dispute referred to the arbitrators were not decided. But the arbitrators did a good deal of work with reference to the arbitration as appears from that award which is a very lengthy document dealing minutely with various properties of the parties. On the 1st July, 1926 these seven persons addressed a petition to three of the gentlemen who acted as arbitrators, in which it was recited that the previous award only settled some of the matters in dispute and these three gentlemen were prepared to deliver an award with reference to the matters left undecided. The petition goes on thus : " We have no objection to your declaring your decisions regarding the undecided matters, and we do request you to deliver your award by putting your decisions in writing. None of us shall be entitled to make any objection with regard to the award you will deliver, either on the ground of the expiry of the time fixed, or on the ground of your having no authority. The award (to be) delivered by you shall be treated as a part of the first award. You shall deliver this award within the 3rd of July next." Acting on the strength of this petition those three gentlemen prepared an award which bears the date of the 3rd July 1926 and these are the two awards which the respondents asked for filing in Court. The objections that were raised by the appellant in the Court below were confined to two issues viz. the second and the third. The second issue refers to the award being bad as falling within the mischief of paragraph 14 of Schedule II of the Civil Procedure Code and the third issue refers to the fact of the making of the award by the arbitrators on the 3rd July, 1926. The learned Subordinate

Judge held in effect that the second award is only a continuation of the award of the 9th March 1926 which has been completed by the latter award and he held that paragraph 14 of the Second Schedule of the Code is no bar to the filing of the two awards as one. With regard to the third issue, the learned Subordinate Judge held that the second award was made on the petition filed by all the parties including the objector before him and it was a valid award. The Subordinate Judge also found that the appellant who was described as a defendant in the Court below had actually received a certain sum of money from the plaintiffs according to the directions given in the first award of the arbitrators and the defendant in his petition did not allege that the second award left any of the moveable properties undivided but he attempted to show that some properties were left undivided in his evidence. The learned Subordinate Judge held that the evidence amounted to this, that the moveables of very trifling value which taken together would amount to only Rs. 300 to 400 were not partitioned, but the defendant has not suffered any loss on that account because he was only entitled to a sixth share of the money and had in his possession a gun the value of which was more than the sixth share of the value of the other moveables and, therefore, he had no reason to complain. Thereupon the learned Subordinate Judge made an order that the two awards be filed and the appeal is against that order.

Mr. Hira Lal Chuckerbutty for the appellant has taken several grounds against the decision of the Court below and it must be admitted that he has gone very carefully through the two awards in order to find discrepancies and flaws which would if substantiated vitiate the award as either incomplete or illegal. The first objection that he takes is that the award is illegal on the face of it; because although five arbitrators were appointed in the Achalnaama, only four of them acted and he argues very forcibly that that makes the award invalid. His argument is that, true according to the majority clause a decision arrived at by the majority of the arbitrators appointed would be a good award but the arbitrators who did not join in the award prepared by the majority must act in the matter of arbitration. The proposition thus stated may be accepted as correct, but in the present case I do not think that it has any substance. The provision as regards the arbitrators acting together has already been recited by me. That may very well be construed as a provision for the event of all the arbitrators not acting in the matter of arbitration. At best the expression

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may be taken as ambiguous. But the meaning is quite clear from the fact that all the parties took that to be a valid award: the only exception that they might possibly have taken was that it was not a complete award. That appears from Exhibit 4, the petition to the three arbitrators dated the 1st July 1926. By that document they not only asked three of the arbitrators to complete the work that had been done by four of them but they accepted the previous award as a valid award binding upon them. Under that circumstance, it cannot be said that the award of the 9th March is illegal on the ground that only four arbitrators acted out of the five named. The answer to the question raised that the first award is invalid because it was not a complete award is also contained in the petition of the parties referred to above. If an award is incomplete, the parties may affirm and may agree that that incomplete award would be binding upon them. The authority for this proposition may be found in the case of *Mahend Ram Suhel v. Sahig Ram Suhel* (1) and the latest case to which our attention was drawn by the learned Advocate for the respondent is that of *Jnanendra Nath Bagchi v. Surus Chandra Roy* (2). The learned Advocate for the appellant, however, contends that in the case of *Jnanendra v. Surus* (2) the parties referred the matter to all the original arbitrators for completion of the work required to be done by the original reference and that differentiates that case from the present one. In my judgment, that is no distinction at all. Even if the parties had appointed quite a different set of arbitrators agreeing to abide by the previous award and asking them to complete the work done by the previous arbitrators, the previous award should be considered as affirmed by the parties and they would not be allowed to attack the award on the ground that it was incomplete. This disposes of the main contentions on behalf of the appellant. But certain other objections were taken which were not finally pressed on its being pointed out to the learned Advocate for the appellant that those questions are really of fact which might have been raised before the lower Court if there was any serious difficulty about giving effect to the award. The only point that appears to be of substance was that in the first award it was directed that properties standing in the name of the parties themselves or their wives should be regarded as their personal properties. In the second award it was pointed out that one bit of property 3 Bighas $1\frac{3}{4}$ Cottas of land standing

(1) (1894) L. R. 21 I. A. 47; I. L. R. 21 Calc. 590.

(2) (1927) I. L. R. 6 Pat. 556.

in the name of a lady named Sreemati Soudamini Debi was held to be ejmali property and it was argued that this really contradicts the previous award. As I have already said, proper explanation might have been obtained about this apparent contradiction if this question had been put to the arbitrators when they were examined in Court and if this matter had been raised before the lower Court. But Mr. Sen on behalf of the respondents points out that these two items refer to properties of two different characters; the statement in the first award relates to ejmali properties and in that award certain provisions have been made with regard to *khamar* lands and the second award with reference to the land standing in the name of Soudamini Debi relates to the partition of *khamar* lands, and it is possible that that is an explanation as to why this land was held to be ejmali. However that may be, I do not think that the award can be attacked here for the first time on account of the slight apparent discrepancies. The most serious thing against the defendant is that the defendant had actually affirmed the award by taking benefits under it and also giving up certain properties according to it. Having acted in accordance with the award he cannot now turn round and say that the award is invalid, unless he can prove that he was acting under some misapprehension. But there is no such evidence. No person can affirm in part an award and then repudiate it in part. He must either accept the whole or repudiate the whole. Under that circumstances, even if there had been any illegality in the award, that has been waived by the conduct of the defendant. This proposition has recently been dealt with in the case of *Hurrybux Deora v. Johurmull Bhatoria* (1) referred to by the learned Advocate for the respondents.

The result, accordingly, is that this appeal must stand dismissed with costs. Hearing fee, fifteen gold mohurs.

N. K. Bose, J :—I agree.

A. T. M.

Appeal dismissed.

CIVIL.

1929.

Ananta Lal Pakrasi

Jnanada Sundari
Debye.

B. B. Ghose, J.

(1) (1929) 33 C. W. N. 711 (713).

Before Mr. Justice Graham and Mr. Justice D. N. Mitter.

CIVIL.

1929.

May, 22.

RAMJOY MODAK AND OTHERS

v.

DURGA CHARAN NATH AND ANOTHER.*

Abandonment—Depending on circumstances—Cause of action, if to be founded on allegation in the pleadings—Written statement.

No cause of action can be founded on any allegation made in the pleadings. It must be antecedent to the suit.

In order to entitle the landlord to re-enter on the ground of abandonment, it must be shown that there has been transfer by way of gift or otherwise, either of the whole or part of the holding and repudiation or relinquishment or abandonment of the tenancy with reference to the remainder by either the original tenant or his heirs.

The written statement should show that there has been a repudiation of the tenancy prior to the institution of the suit.

The mere fact that for a very short period rent had not been paid by the tenant cannot justify the landlord to consider that the holding has been abandoned by the tenant.

The question as to whether there has been abandonment depends on the circumstances of each case: *Dayamayi v. Ananda* (1).

Appeal by the Plaintiffs.

Suit for ejectment.

The material facts appear from the judgment.

Mr. Birendra Kumar De for the Appellants.

Messrs. Biswa Nath Roy and Birendra Lal Das Chowdhury for the Respondent who appeared.

The following judgments were delivered :

D. N. Mitter, J :—This is an appeal by the plaintiffs and arises out of a suit brought by them on the allegation that the lands were originally held by one Dina Nath at a jama of Rs. 8-3-0 and that Dina Nath made a gift of the entire holding on the 5th March, 1327 B. S. to defendant No. 1 and that the defendant No. 1 took possession of the jote on the 13th November 1923 and that consequently there has been an abandonment by the old tenant of this holding which entitles the plaintiffs to re-enter. The defence of defendant No. 1 in substance was that the entire jote of Dina Nath

* Appeal from Appellate Decree No. 1748 of 1927, against the decree of Babu Mahendra Nath Mukuti, Subordinate Judge, 2nd Court, of Sylhet, dated the 9th March, 1927, reversing that of Babu Jatindra Kumar Bose, Munsiff, 3rd Court, at Habiganj, dated the 17th August, 1925.

(1) (1914) 1 L. R. 42 Calc. 172 ; 20 C. L. J. 52 (F. B.).

May, 22.

was not transferred to him by the deed of gift and there has not been an abandonment of the jote by the heirs of the old tenant Dina Nath having died since the execution of the deed of gift. The Court of first instance found that there has been a gift of the entire holding of Dina Nath and basing its decision on this finding decreed the plaintiffs' suit and declared the plaintiffs' Maliki right to the lands in suit and directed that they do get Khas possession therein after ejecting the defendants. Against this decision an appeal was taken to the Court of the second Subordinate Judge of Sylhet. The Subordinate Judge came to the conclusion that there has not been a transfer by way of gift of the entire holding, that out of 17 Keyars which is the area of the holding the deed of gift covers only 15 Keyars and there has not been any abandonment as after the deed of gift the widow of Dina Nath, the original tenant, used to be in possession of the lands reserved by Dina Nath through Bhagidar tenants. On this view the lower appellate Court reversed the decision of the Court of first instance and dismissed the plaintiffs' suit. The plaintiffs have consequently brought this second appeal and the main contention before us on behalf of the plaintiffs appellants has been that there has not been a proper finding on the question of abandonment by the lower appellate Court and the case should be remitted to him in order that he may re-hear the appeal on the question of abandonment.

The finding of the lower appellate Court that the widow of Dina Nath possessed a portion of the holding even after the deed of gift cannot be questioned in second appeal. Dina Nath died in 1329 B. S. and his widow Bisakha who succeeded him died in 1330 B. S. i. e. sometime in 1923. According to the finding of the lower appellate Court the widow was in possession till 1923 and the present suit was commenced on the 12th June 1924. It has been argued by the learned Advocate for the appellants that as no rent has been paid by Dina Nath's daughter who succeeded to Dina Nath's holding after the death of Bisakha the lower appellate Court should have inferred that there has been an abandonment of the holding. It has also been stated that in the written statement which had been filed by Dina Nath's daughter in Court in this case she has disclaimed any interest in this tenancy and it is said that that is sufficient to entitle the landlord to re-enter. With reference to the written statement it is enough to state that no cause of action could be founded on any allegation made in the pleadings. The cause of action must be antecedent to the suit. In order to entitle the landlord to re-enter it must be shown that there has

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been transfer by way of gift either of the whole or part of the holding and repudiation or relinquishment or abandonment of the tenancy with reference to the remainder by either the original tenant or the heirs of the said tenant. The written statement which is filed in the course of the suit does not show that there has been a repudiation of the tenancy prior to the institution of the suit. It could not give rise to the cause of action for this suit. Neither do we think that the mere fact that for a very short period rent had not been paid by the heirs of Dina Nath can justify the landlord to consider that the holding has been abandoned by the old tenant. It would not be right having regard to the shortness of the period intervening between the cessation of the payment of the rent and the date when the suit was instituted to infer abandonment by the original tenant even assuming that the question of abandonment is a question to be inferred from the facts found. It has been pointed out in the Full Bench case of *Dayamayi v Ananda Mohan Roy* (1) that the question as to whether there has been an abandonment depends on the circumstances of each case. We are not satisfied that the facts on which reliance has been placed by the learned Advocate for the appellants constitute an abandonment.

The result is that the appeal fails and must be dismissed with costs.

Graham, J :—I agree.

A. T. M.

Appeal dismissed.

(1) (1914) I. L. R. 42 Cal. 172 ; 20 C. L. J. 52.

CRIMINAL REVISION.

Before Mr. Justice M. N. Mukherji and Mr. Justice Jack.

JAMIR SHEIK AND OTHERS

v.

MURARI MOHAN CHAUDHURY AND ANOTHER.*

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August, 1.

Adjournment—Application for transfer—Proceeding under section 145 Criminal Procedure Code—Criminal Procedure Code (Act V of 1898), Secs. 145, 526 (8).

Clause (8) of section 526 of the Code of Criminal Procedure does not apply to proceedings under section 145.

It is not obligatory on the Magistrate to grant an adjournment on receipt of an application intimating him that an application will be made for transfer under section 526 of the Code of Criminal Procedure and asking him to adjourn the case for that purpose and the rejection of the application is not in violation of the provisions of the law.

On the facts of the present case, the petitioner is not entitled to an adjournment.

Application for Revision under section 435 of the Code of Criminal Procedure by the Second Party.

Proceeding under section 145 of the Code of Criminal Procedure.

The material facts appear from the judgment.

Messrs. Mrityunjay Chattopadhyay and Debabrata Mukherji for the Petitioners.

Messrs. Sures Chandra Talukdar and Sudhansu Sekhar Mukherji for the Opposite Party.

The following judgment was delivered :

The question raised in this Rule is whether clause (8) of section 526 Criminal Procedure Code applies to proceedings under section 145 Criminal Procedure Code. The words in clause (8) as they stood before the amendment of 1923 were : "If in any criminal case or appeal, before the commencement of the hearing &c.". By the amendment aforesaid these words have been altered into "If in the course of any enquiry or trial or before the commencement of the hearing of any appeal &c.". The introduction of the word 'enquiry' in place of the words 'any criminal case' may ordinarily be taken to have been intended for the purpose of includ-

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* Criminal Revision No. 412 of 1929, against the order of B. K. Bose Esq., Sessions Judge of Burdwan, dated the 25th February, 1929 affirming that of Babu Surendra Mohan Bhowmik, Sub-Divisional Officer of Katwa, dated the 25th January, 1929.

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ing proceedings under section 145 Criminal Procedure Code, but the rest of the clause if read properly would militate against this view. Proceedings under section 145 Criminal Procedure Code are no doubt proceedings by way of enquiry. But then the words of clause (8) of section 526 such as 'the complainant' 'the accused' and perhaps also the word 'public prosecutor' would be wholly inapposite in connection with proceedings under section 145 Criminal Procedure Code. The parties to proceedings under section 145 are described as parties in that section and the use of the words 'complainant' 'accused' and perhaps also the word 'public prosecutor' and the non-mention of the word 'party' in the latter part of clause (8) makes it perfectly clear that it was not the intention of the Legislature to include proceedings under section 145 Criminal Procedure Code within the meaning of the clause. For this reason we are of opinion that the contention that has been urged on behalf of the petitioner, which is to the effect that it was obligatory on the learned Magistrate to grant an adjournment on receipt of the application filed by the petitioner intimating to him that an application would be made for transfer under section 526, and, asking him to adjourn the case for that purpose, should be overruled, and the rejection of that application cannot be held to have been in violation of the provisions of Code. Apart from clause (8) of section 526 the petitioner had no case whatsoever because in the application that was made asking for an adjournment to enable the petitioner to move this Court for transfer no ground whatsoever was stated, and also because the said application was made at a very late stage of the proceedings, after the evidence on behalf of the opposite party, which had been taken on two different dates, was closed. We are of opinion that there is no substance in this Rule. It is accordingly discharged.

A. T. M.

Rule discharged.

APPELLATE CIVIL

Before Mr. Justice Sukrawardy and Mr. Justice Jack.

SRISH CHANDRA BANERJEE AND ANOTHER

v.

DEBENDRA NATH BANERJEE AND OTHERS.*

Lease—Receiver, if can grant—Misrepresentation or concealment of material facts—Disadvantageous—Debutter property—Benefit.

A Receiver has no power to lease a debutter property without the sanction of the Court. Any misrepresentation or concealment of material facts from the Court in connection with a proposed lease would vitiate the authority of the Receiver to grant the lease.

A lease is liable to be cancelled if it be disadvantageous and not for the benefit of the debutter estate.

Appeal by Defendants Nos. 1 and 2.

The material facts appear from the judgment.

Messrs. Brojo Lal Chakravarti, Sitaram Banerjee and Diptendra Mohan Ghose for the Appellants.

Dr. Sarat Chandra Basak, and Mr. Jitendra Kumar Sen Gupta for the Plaintiffs Respondents.

C. A. V.

The following judgments were delivered :

JACK, J.—The appeal has arisen out of a dispute as to the rights of the parties in a debutter estate. The only two questions arising in this appeal are (1) whether a lease granted by a Receiver appointed by the Court to defendant No. 2 has been rightly cancelled by the lower appellate Court : (2) whether the lower appellate Court was correct in holding that the plaintiffs as co-shebait with defendant No. 1 were entitled to remove the idol to their exclusive custody for $7\frac{1}{2}$ months of the year. The appellants contend that the decision of the lower appellate Court on both these points is not justified in the circumstances of the case.

The lease was cancelled on the grounds that (1) the Receiver concealed from the Court the fact that the lessee was her own grandson and a brother of Sirish Chandra Banerjee the adopted son of Bama Sundari the previous shebait of the 5 annas share by virtue of a compromise with Promotho Nath Banerjee. The latter was the predecessor of the plaintiffs and shebait under the compromise of the 10 annas share, in whose place the Receiver was

*Appeal from Appellate Decree No. 992 of 1929, against the decree of J. M. Pringle Esq., District Judge of 24-Parganas, dated the 6th March, 1929, modifying that of Babu Hem Chandra Das Gupta, Subordinate Judge, 3rd Court, of Alipore, dated the 21st January, 1928.

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Jadh, J.

appointed by the Court. He died in 1924 and the Receivership has been terminated by the Court.

The Receiver has of course no power to lease the Debutter property without the sanction of the Court and the Court below has quite rightly held that any misrepresentation or concealment of material facts from the Court in connection with a proposed lease would vitiate the authority of the Receiver to grant the lease. In the present case there was such concealment and it is possible that the Court might not have granted sanction to the lease or at least might have scrutinized the terms more closely had it known of the relationship. Another objection is that in the lease an additional clause was introduced which was not contained in the terms proposed in the application for sanction, i.e., that if the lessee was not paid the price of any permanent structures as settled by an Engineer appointed by both parties, he would not be bound to give up the property. According to the application (the terms proposed which were sanctioned by the Court) the shebaitis were to pay to the lessee the full value of all such structures erected by the lessee. That being so, if the value was not paid the lessee would certainly be entitled at least to a lien on the property, so that the added clause did not really add very much to the terms sanctioned.

The first objection is more serious and had it been shown that the lease was in any way a disadvantageous one and not for the benefit of the Debutter estate then I certainly think it should be cancelled. On the findings however arrived at by the Court of 1st instance which have not been upset by the learned appellate Judge it appears that the lease has been to the advantage of the estate and there seems every reason to think that its continuance will be for the advantage of the estate. In these circumstances it is doubtful if there was any fraud practised on the Court or intended when the lease was granted. No attempt has apparently been made to erect permanent structures and the clause entitling the lessee to continue in possession not having received the sanction of the Court would not be binding on the shebaitis—and cannot be deleted from the lease. There seems to be some ground for the surmise of the trial Court that if the lease is cancelled it will lead to wastage of the property through disputes between the shebaitis and, in the circumstances, since the continuance of the existing lease (apart from the clause about retaining possession on the expiry of the lease) appears to be for the benefit of the estate, the fact that there is reason to suspect fraud at the time of its inception does not seem to be a good ground for cancelling

it entirely. Ground No. 7 of the appeal indicates that the lessee wishes to continue the lease with the objectionable added clause deleted and we think that the order of the Court of appeal below should be modified accordingly.

The remaining point is regarding the removal of the idol. Under the terms of the compromise between Pramatha and Bama-sundari, Pramatha was entitled to worship the deity at any place convenient to him during his Pala or turn of worship. The trial Court however refused the prayer of the plaintiffs that they might move the idol holding that to do so would endanger the Puja. The idol has been in a rented house in Kidderpore for the last 35 years but there is no specific temple for it and in the circumstances we think that the appellate Court was right in holding that the plaintiffs could not be refused their right under the terms of the compromise to have the idol during their $7\frac{1}{2}$ months Pala where they can worship it conveniently. The appellants however rightly object to the removal of the idol from place to place especially as the plaintiffs have no suitable place to keep it. In the circumstances we are inclined to favour the proposal referred to in the trial Court to construct a separate abode for the idol on a part of the Debutter estate where it could be conveniently worshipped in turn by the parties. This suggestion was discussed in our presence by the representatives of the parties and it was agreed that a suitable building should be erected the expense being met from the land acquisition funds which are due to the estate. A Receiver will be appointed under the direction of the Court (if possible some one who will act without expense to the parties) for this purpose. The defendants object to provision in the building for accommodation for the sebaits and we think that this is not necessary. The trial Court will also decide when the time of worship of the parties will commence should there be any disagreement on this point. The appeal is allowed accordingly. The lease will remain in force excluding the clause entitling the lessee to remain in possession after the termination of the lease—and a building will be erected as speedily as possible for the residence of the idol under the direction of the Court where the plaintiffs and defendants can worship it for $7\frac{1}{2}$ and $4\frac{1}{2}$ months respectively.

The case will accordingly be remitted to the trial Court for the purposes indicated. The parties will pay their own costs.

Suhrawardy, J :—I agree.

A. T. M.

Case remanded.

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Jach. J.

PRIVY COUNCIL.

PRESENT : *Lord Tomlin, Lord Salvesen and Sir John Wallis.*

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SHETH MAFATLAL GAGAL BAI

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June, 4.

SHETH JIVANLAL GIRDHARDAS AND ANOTHER.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Concurrent findings of fact—Practice of the Privy Council.

According to the well-established practice of the Privy Council, concurrent findings of fact by the Courts below will not, ordinarily, be reviewed by their Lordships' Board, when there is evidence upon which those findings could have been reached. *Robins v. National Trust Coy Ltd.* (1) followed.

Appeal No. 160 of 1927 by the Plaintiff, from a decree of the High Court, Bombay (*MacLeod C.J.* and *Coyajee J.*), dated the 23rd February, 1926, which confirmed with a variation only as to the order for costs a decree of the Court of the Subordinate Judge of Ahmedabad, dated the 31st July, 1924, and dismissed a suit which the appellant had brought in that Court.

The question for determination in this appeal was whether the appellant and the respondents were partners in a lease of the New Spinning Company and in the Ahmedabad New Textile Mill Company Limited. Respondents denied the partnership and both Courts in India found against the appellant's claim.

Their Lordships' decision turned upon the short ground that there were concurrent findings by the Courts in India on questions of fact sufficient for the disposal of the present appeal.

Gross K. C., *Raike* and *McNair* for the Appellant.

Upjohn K. C., *DeGruyther K. C.* and *Parikh* for the Respondents.

Gross K. C. : There are no concurrent findings of fact here. The judgment of the Board in *Satgur Prasad v. Raj Kishore Lal* (2) qualifies the rule as to concurrent findings.

The Rule does not apply where you are drawing inference from the language used in a document.

(*Sir John Wallis* : Is it your case that it is a question of misconstruction of documents here ?)

(*Lord Tomlin* : A question of construction is, undoubtedly, a question of law.)

(1) (1927) App. Cas. 515.

(2) (1919) 1 L. R. 42 All. 152.

The terms of the agreement were reduced to writing and it was not therefore competent to the Court to go outside the document. Oral evidence was not admissible; see Evidence Act, section 91.

(*Lord Tomlin* : That section has no application to the present case. The section contemplates a case where a party produces a written contract, and according to the well-known rule of English law, you are precluded from giving oral evidence).

(*Sir John Wallis* : Section 91 of the Evidence Act refers to a document where there is a written contract).

The following authorities were cited at the Bar during the course of the argument : *Robins v. National Trust Coy. Ltd.* (1) ; *Satgur Prasad v. Raj Kishore Lal* (2) ; *Moung Tha Huyen v. Moung Pan Nyo* (3) ; *Ram Anugra Narsin Singh v. Chomderry Hanuman Sahai* (4) and *Rani Shrimati v. Khagendra Narayan Singh* (5).

Their Lordships' judgment was delivered by

Lord Tomlin. : This is an appeal from a decree of the High Court of Judicature at Bombay dated the 23rd February, 1926.

By this decree the High Court affirmed, with a variation as to costs, a decree of the Subordinate Judge of Ahmedabad dated the 31st July, 1924, whereby a suit of the appellant against the respondents was dismissed.

The appellant's claims in the suit were :

(a) For a declaration of his right to a four annas share of the profits which the respondents and others had made by working the properties of the Ahmedabad New Spinning and Manufacturing Company (which will be referred to hereafter as the old Company) under a lease from the holders of debentures in that company, and for payment by the respondents of that share of those profits when ascertained ;

(b) For a declaration of his right to a one and a half annas share of the commission earned by the respondents and others as agents of the Ahmedabad New Textile Mills Company, Limited (which will be referred to hereafter as the new Company) and of his right to payment of that share by the respondents, and for payment by them of that share in the commission earned to date of suit.

(1) [1927] App. Cas. 515 (P. C.)

(3) (1900) I. L. R. 28 Calc. 1.

(5) (1904) I. L. R. 31 Calc. 871.

(2) (1919) I. L. R. 48 All. 152.

(4) (1902) I. L. R. 30 Calc. 303.

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The claim is based upon an oral agreement of partnership alleged to have been made on the 30th July, 1915.

The events which led up to the alleged agreement are as follows :—

The old company was formed in 1894, and in 1909, raised a loan of 5 lacs by the issue of 1,000 mortgage debentures of Rs. 500 each, secured by a trust deed. Jeynarayan Hindumal Dani was a trustee for the debenture-holders ; he was also managing director of the Bombay Merchants' Bank, Limited. The Bank held debentures for Rs. 1,25,000. A further part of the issue, viz., Rs. 2,25,000, was held by one Motilal.

In or about March, 1911, the old company made default upon the debentures, and the trustees of the trust deed, in exercise of the powers conferred by such deed, took possession of the properties of the old company, including its spinning mill.

In May, 1914, the trustees let the mill to one Dolatram. The lease or tenancy agreement to Dolatram has not been produced, but apparently his tenancy expired on the 25th February, 1915.

On the 21st November, 1914, the trustees, according to the appellant's case, agreed to let to him the mill for a year from the expiration of the tenancy of Dolatram at a rent which would not exceed a maximum of Rs. 36,000 per annum. This agreement has not been produced and the terms of it have not been proved.

About the same time the appellant made an offer to buy the Bank's debentures, and on the 28th November, 1914, this offer was considered by the Board of Directors of the Bank, and Dani was authorised by the Board to negotiate for the sale of the debentures provided half of the consideration was paid in cash at once and the other half within six months from the date of the arrangement.

Two letters, one from Dani to the appellant, dated the 21st November, 1914, and the other from the appellant addressed to the Bank, dated the 29th November, 1914, purport to contain the terms of an agreement made between the appellant and the Bank, whereby the appellant is expressed to become the purchaser of the Bank's debentures with the accrued interest due thereon for Rs. 1,41,000, to be paid in cash on the transference of the debentures.

It appears from the appellant's own evidence and from the evidence of Ramanbhai, who was Dani's lawyer, that the arrangement embodied in these two letters was by virtue of an oral agree-

ment between the appellant and Dani, only to be operative if the appellant got possession of the mill, and that for this reason Ramanbhai retained the letters.

In December, 1914, some of the debenture-holders became aware of what was going forward, and believing that Dani in his arrangements with the appellant was sacrificing the interests of the debenture-holders to the interests of the Bank, addressed a letter to the trustees protesting against the leasing of the mill to the appellant.

Notwithstanding this protest, Dani and the appellant attempted without success to secure the assent of Dani's co-trustees to a modification of the appellant's agreement for a lease by making the tenancy term run, in the event of Dolatram not giving up possession on the 25th February, 1915, from the date when he should in fact give up possession; certain expenses being, however, paid by the appellant. A document embodying these terms was signed by Dani and the appellant. The other trustees did not sign it.

In the meantime, an order was made for the compulsory winding up of the old company, and a liquidator was appointed.

After his appointment the liquidator, in the name of the old company, launched a suit at Ahmedabad against the trustees of the debenture trust deed for a declaration that the debenture loan was not binding on the old company and for recovering possession of the properties of the old company from the trustees.

On the 20th February, 1915, the liquidator obtained a temporary injunction restraining the trustees from entering into any agreement with the appellant or handing over possession of the properties of the old company to the appellant or to anyone either as tenant or otherwise.

A temporary injunction to a similar effect was also obtained for a short time by a debenture-holder in another suit.

When the 25th February, 1915, arrived, Dolatram refused to go out of possession of the mill. Subsequently the liquidator invited tenders for the purchase of the properties of the old company.

On the 21st March, 1915, a tender was submitted to the liquidator by the respondent Jivanlal, acting for himself and the respondent Mangaldas. It was in effect an offer to buy the properties of the old company for Rs. 7,25,000, of which Rs. 5,50,000 were to be applied in satisfying the claims of the debenture-holders.

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Lord Tenterden.

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On the 29th March, 1915, the tender of the respondent Jivanlal was accepted and sanctioned by the Court subject to a valid arrangement being effected with the debenture-holders.

At the end of July, 1915, no arrangement had been made by the respondents with the debenture-holders, and Dolatram was still in possession of the mill.

The next material event is the critical one in the case.

On the 30th July, 1915, a conference took place between the appellant and the respondents. One Nathubhai, a pleader, was also present. It is alleged by the appellant that an oral agreement was on that occasion reached between himself and the respondents. Upon that alleged oral agreement he is now suing.

At that conference a draft of terms was prepared by Nathubhai in pencil, and after alterations had been made in the draft in ink the appellant signed it. The respondents did not sign it. The draft remained in the possession of Nathubhai.

The draft was in the following terms :

" I, Sheth Mafatlal Gagalbhai, residing in Dariapur, in the City of Ahmedabad, passing the writing, to Parikh Jivanlal Girdhardas, residing in Sankdi Sheri Nanabhai Munshi's Pole, in the City of Ahmedabad, give in writing this agreement that—

" I have taken over the working of the Mills of the Ahmedabad New Spg. and Mfg. Co. Ltd., from the Trustees of the Debenture-holders of the Company, Messrs. Jayanarayan Hindumal Dani and Ambalal Harivallabhdas, on a lease or *Bhada Khata*, dated 21st November, 1914.

" Moreover, I have executed a document in favour of the said Trustees whereby I am to pay to them on my receiving possession of the Mills in pursuance of my lease the expenses incurred by them on account of the said Mill, and I am to recoup the same from the amounts payable by me.

" I have taken you as a partner on the following conditions, in all my rights and liabilities under the said lease. Our said partnership is to be under the name of Sheth Mafatlal Gagalbhai and Company.

" (1) I have purchased for Rs. 1,41,000 the debentures of the said Mill held by the Merchants' Bank of the face value of Rs. 1,25,000, with all the rights to interest etc., accrued in respect thereof, and the condition is that I am to pay the said amount on (my) getting possession of the Mill. You should pay this amount,

which shall be paid on account of our partnership, on getting possession of the Mill : and the balance due to the trustees out of the amount spent by them is to be paid by me in pursuance of my agreement with them, on obtaining possession of the Mill, and to be recouped by me from the amounts payable to the Trustees under the lease. You have to pay that amount on getting possession of the Mill and recoup that from the amounts payable to the Trustees. You are entitled to charge in the partnership accounts interest at the rate of 6 per cent per annum on both the said amounts which you will advance on account of the partnership : and the said interest is to be treated as expenses in the accounts of the working of the Mill and to be recovered by you as such.

"(2) You are to provide all the funds necessary for working the said Mills : and you are entitled to charge thereon interest at the rate of 6 per cent per annum ; and that amount (of interest) is to be treated as expenses in the accounts of the working of the Mills.

"(3) You are to conduct the entire management of the (working of) the Mill, and I am not to interfere therein in any manner.

"(4) In consideration of your locking your funds as provided in clauses 1, 2, 3 above for working of the Mill etc., as also in consideration of your working the Mill, you are to be paid from surplus remaining after deducting $2\frac{1}{2}$ per cent, for charity of the net profits earned by our partnership in the proportion of six annas in a rupee of 16 annas.

"Yours is the authority to dispose of the amount of the $2\frac{1}{2}$ per cent, set apart from the net profits for charitable purposes as stated above.

"(5) After setting apart as provided above $2\frac{1}{2}$ per cent. for charity and six annas as your special (share) out of the net profits of our partnership, you are to receive six annas as your share, and I am to receive four annas as my share out of the remaining ten annas. In case there be loss to the partnership, i.e., in the working and in respect of the purchase of debentures as well as in the capital and interest, etc., as also in the monies which are to be advanced to the trustees as mentioned above, the said loss is to be borne by you in the proportion of ten annas in the rupee and by me in the proportion of four annas, calculating ten annas as equivalent to a rupee.

"(6) The amount to be treated as the net profit will be the

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amount remaining after the treating as expenditure the interest of the money advanced by you or borrowed from you for working of the Mill, for labour, stores, coal, ground rent, taxes and management, as well as the Adat which may have to be given to any Shroff other than the firm of Sheth Girdharlal Jethabhai—as also the interest on the money required for the purchase of the Debentures, as well as the interest on the monies to be advanced to the Trustees for the remaining amount spent by them, as well as all necessary expenses in connection with the working, as also repairs to the machinery for keeping it in working condition, as well as in replacing broken parts, as also in making repairs to or alterations in the buildings, and such net profits should be divided according to the respective shares every year, and if there be any loss to the partnership as stated above it should be recouped every year in the above proportion.

“(7) You have given a tender for the purchase of the New Spg. Mill ; in case the purchase is sanctioned and you get possession of the Mill in pursuance of the purchase you are bound to form a Joint Stock Company ; and you have agreed to give to me $1\frac{1}{2}$ annas share as commission out of the amount calculated at the rate of 3 ples per pound of yarn and cloth manufactured in the Mill, treating the said amount as 16 annas ; and as you have agreed to that condition, I have agreed to this partnership. Therefore you should enter my name as a sharer in commission along with yours in the deed when you form a Joint Stock Company on completion of your purchase of the Mill ; and you are to execute in my favour a document according to law relating thereto.”

On the same 30th July, 1915, a letter dated the 31st July, 1915, was written by Jivanlal to the Liquidator, asking in effect that the sanction of the Court to the acceptance of his tender might be made public, a course which up to that time had apparently not been taken.

Some of the terms of this letter are difficult to reconcile with any view of this case. In the course of it the writer said, “As regards Mill properties, Mr. Mafatlal Gagalbai” (*i. e.*, the appellant), “of this city has obtained a lease from the trustees. I have, however, taken over the working from him as his partner.” Jivanlal also included in the letter an offer to take a lease of the mill himself at a rent of Rs. 16,259 per annum over and above

the Rs. 36,000 to be given to the trustees under the appellant's lease.

This proposal of Jivanlal to take a lease seems to have received the approval of the District Judge on the 6th August, 1915, and about the same date the temporary injunction which had been obtained by the Liquidator was dissolved. The Liquidator's suit was not proceeded with.

Having regard to the conclusion to which their Lordships feel bound to come in this case, the subsequent events do not require to be elaborately stated. It is enough to say:—

(1) That possession of the mill was not obtained from Dolatram until the 24th February, 1916.

(2) That the respondents agreed to purchase the debentures for Rs. 2,25,000 held by Motilal.

(3) That the debenture-holders did not sanction the grant of any lease to the appellant under the agreement of the 14th November, 1914, but approved the grant to one Manival, a nominee of the respondents, of a lease on terms more favourable to the debenture-holders than the terms contained in the agreement of the 21st November, 1914.

(4) That on the 24th February, 1916, a lease upon these more favourable terms was accordingly granted by the trustees for the debenture-holders to the respondents and others.

(5) That the respondents acquired from the Bank the latter's debentures at the same price as that mentioned in the letters which had passed between the appellant and Dani, but upon terms different as to time of payment.

(6) That the respondents worked the mill under the lease until the completion of the purchase of the properties of the old company by the new company as next hereafter mentioned.

(7) That the new company was formed by the respondents to take over and took over the properties of the old company upon the terms of Jivanlal's tender.

(8) That the respondents constituted themselves and others managers of the new company for a term of 99 years at a commission shared in certain proportions between themselves and their co-adventurers.

(9) That the appellant was given no part in any of these transactions nor any share in the profits of working the mill under the lease or in the commission payable by the new company.

The appellant launched the present suit on the 13th Octo-

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ber, 1917. As already stated, he has failed in both the Courts below.

Before their Lordships' Board the appellant did not press his first claim in the suit, as no profits resulted from the working of the mill under the lease granted by the trustees.

Their Lordships are satisfied that there have been in the Courts below the following concurrent findings of fact, namely (1) that if there was any concluded agreement at all reached upon the 30th July, 1915, between the appellant and defendants, such agreement was only to operate if and when possession of the mill was given to the appellant under his agreement for a lease of the 1st November, 1914, and (2) that this condition precedent to the operation of such agreement, if any, was not fulfilled.

Their Lordships are further satisfied that there was evidence upon which these findings could have been reached, and that there does not exist in the case any circumstance which would justify their Lordships in reviewing these findings having regard to the practice of their Lordships' Board, as stated by Lord Dunedin in *Robins v. National Trust Company* (1). In their Lordships' judgment the appellant's case must be dealt with on the basis of these findings and must fail.

In this aspect of the case it becomes unnecessary for their Lordships to express any opinion upon any of the other questions debated before the Board in the course of the appeal. Their Lordships will humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

T. L. Wilson & Co. Solicitors for the Appellant.

Stanley, Johnson & Allen. Solicitors for the Respondents.

K. J. R.

Appeal dismissed.

(1) [1927] A. C. 515.

PRESENT : *Lord Carson, Sir Lancelot Sanderson and Sir
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MAHARAJ BAHADUR SINGH AND OTHERS

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA.]

Limitation—Civil Procedure Code (Act V of 1908), Sec. 48—Application for execution, whether a “fresh” application or merely in continuation of a previous one.

Where an application for execution is, having regard to the nature of the relief sought and other surrounding circumstances, essentially different in character from a previous application which the decree-holder had virtually abandoned, and marks a substantial departure therefrom, it cannot be regarded as a continuation of the execution proceedings initiated by the earlier application, but must be treated as a “fresh” application for execution within the meaning of section 48 of the Civil Procedure Code, 1908, and would be barred by limitation if presented more than twelve years from the date of the decree sought to be executed.

Appeal No. 60 of 1927 by the Decree-holders, from a judgment and decree, dated the 29th March, 1926, of the High Court, Patna (*Doss and Foster JJ.*), which affirmed a judgment and decree, dated the 16th April, 1924, of the District Judge of Purnea.

The material facts of the case are fully set out in their Lordships’ judgment.

The principal point for determination on the appeal to His Majesty in Council was whether the appellants who were decree-holders were entitled to execute the decree for the arrears of patni rent, dated the 10th of July, 1896, obtained against the patnidar whose now representative-in-interest was the respondent.

Mr. Justice Foster, in the High Court, was of opinion that *Forbes v. Maharaj Bahadur* (1) operated as *res judicata* and that the execution was barred by limitation. On the latter question, his Lordship’s judgment was as follows :—

“ I am also of opinion that the execution is barred by limitation. The painstaking and helpful judgment of the learned District Judge is, so far as I can see, unassailable in this part of his discussion of the case. I agree with him that the petitions of the 22nd January, 1915 ; 9th March, 1917 ; 23rd November, 1918 and

(1) (1914) L. R. 41 I. A. 91 ; I. L. R. 41 Calc. 926 ; 25 C. L. J. 434.

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and December, 1922 marked substantial departures from the original application for execution preferred in 1908 ; so substantial as to indicate breaks in continuity. In the application of 1917 we find a prayer to follow the moveable properties of Chatrapat Singh and properties other than the patni tenure. In the application of 1918 we find a proposal to follow the personal property of Surendra Narain Singh. These appear to me to shew divergences of a fundamental character from the course of execution commenced in 1908. I therefore have no hesitation in finding that the present execution is barred by limitation".

In the result, both the learned Judges in the High Court concurred in making a decree affirming the order of the District Judge, and from that decree the appellants preferred the present appeal to His Majesty in Council.

Raikes and Abdul Majid for the Appellants.

Dube for the Respondent.

Their Lordships' judgment was delivered by

June, 11.

Sir Binod Mitter : This is an appeal against the decision of the High Court of Patna, dated 29th March, 1926, affirming the decision of the District Judge of Purneah, whereby it was held that a decree obtained by Dhanpat Sing, dated 10th July, 1896, cannot be executed against the respondent.

Dhanpat Sing was the *samindar* of Lot Saifganj in Pargana Haveli, in the district of Purneah, and Chatterpat Sing was the holder of the *patni* of the said lot. He settled the same in several parcels with various *dar-patnidars* amongst others with the father of the present respondent. Dhanpat sold his *samindari* to Bhagwanbati on the 27th June, 1893.

Dhanpat instituted a suit against the *patnidar* Chatterpat Sing on 21st September, 1893, for arrears of rent due to him up to 27th June, 1893, and obtained a decree which became final on 10th July, 1896.

On 19th July, 1896, Dhanpat executed a deed of trust in favour of several trustees for the benefit of his son Mahara] Bahadur Singh (and they are hereinafter referred to as appellants or decree-holders) of several properties, including amongst others the decree of 10th July, 1896. Dhanpat died on the 21st July, 1896.

Chatterpat again defaulted in the payment of rent of the *patni* and on 14th May, 1900, Bhagwanbati, the purchaser, put up the *patni* for sale for arrears of rent for a period subsequent to her purchase. Mr. Forbes paid the arrears due to Bhagwanbati,

amounting to Rs. 6,562-8, for the protection of his *dar-patni* tenure, and by such payment became a mortgagee of the entire *putni* under Section 13, Subsection 4, of the Putni Regulation, and he was put into possession of the same under the same section.

In execution of a money decree the right title and interest of Chatterpat in the *putni* tenure was sold on the 1st September, 1902 and one Surendra Narayan Sing purchased the same and obtained symbolical possession of the *putni* on the 18th May, 1902, although Mr. Forbes continued to be in actual possession.

Thereafter there was litigation between the decree-holders and Surendra. The latter alleged that the decree was a money decree, but it was ultimately held between them that the decree was a rent decree creating a charge on the *putni* tenure under Section 65 of the Bengal Tenancy Act.

The decree-holders applied on 9th May, 1908, for execution of that decree against the judgment debtor and the execution case was numbered 11 of 1908. The *putni* was attached and sold in execution of the said decree, but the sale was ultimately set aside on 16th February, 1911.

Mr. Forbes on the 9th July, 1906, instituted a suit against the decree-holders and Surendra for a declaration that the decree was a mere money decree, and on the 9th March, 1914, it was ultimately held by their Lordships of the Judicial Committee that the decree of 10th July, 1906, was not a decree for rent under section 65 of the Bengal Tenancy Act, creating a charge on the tenure, but only a money decree, and that the respondent in this appeal had a charge under the Putni Regulation, and in any event this charge was not affected by any charge under the Bengal Tenancy Act. Their Lordships further held that the appellants were not entitled to execute the decree against the *putni* and they were restrained by a perpetual injunction from doing so. [*See Forbes v. Maharaj Bahadur* (1)].

In the meantime a suit numbered 240 of 1910 had been instituted by Surendra against the respondent Forbes for accounts to which the decree-holders, that is, Maharaj Bahadur and others, were not made parties.

In that last-mentioned suit a final decree for the sale of the *putni* was made under Order 34 Rule 5, in favour of the respondent on 8th January, 1917, and the property was sold at the instance of the respondent and purchased by the latter on 4th August, 1917, for the sum of Rs. 2,000.

(1) (1914) L. R. 41 I. A. 91; I. L. R. 41 Calc. 986; 25 C. L. J. 434.

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The appellants, the present decree-holders, on 22nd January, 1915, and on dates subsequent thereto, made various applications for execution of the decree against the judgment debtor and Surendra and the respondent. The last application was on 2nd December, 1922. The details of such applications will be discussed later on.

The application of 2nd December, 1922, was against the respondent and asked for process against him for the sale of the *putni mahal*. This application was dismissed by the trial Judge on 16th April, 1924, on the ground that the respondent was not a representative of the judgment debtor and that the decree could not be executed against him. The trial Judge further held that the application of 2nd December, 1922, was not a continuation of the application of 9th May, 1908, but was a fresh application within the meaning of Section 48 of the Civil Procedure Code and was barred by the law of limitation.

The decree-holders appealed to the High Court of Judicature at Patna, and Mr. Justice Das, one of the Judges, dismissed it, holding that, although the respondent as purchaser must be regarded as the representative of the mortgagor, he must also be considered as the representative in interest of the mortgagee and that the charge of the mortgagee is not extinguished in the hands of the respondent as purchaser of the property. He did not in that view express any opinion upon the other questions raised in the appeal. Mr. Justice Foster, the other Judge, held that by reason of the decision of the Judicial Committee in 1914 there was *res judicata* not only between the appellants and the respondent but also between the present appellants and Surendra, and he further held that the decree was barred by limitation. The present appeal is against the last-mentioned decision.

The appellants in the present appeal contended, firstly, that the application of 2nd December, 1922, was a continuation of the execution proceedings initiated by their application of 9th May, 1908; secondly, that as it had been held that the decree created a charge on the *putni* against Surendra and as the respondent merely purchased the equity of redemption from Surendra, the decree-holders must be deemed to be in the position of a second mortgagee of the *putni* and were entitled to sell the equity of redemption in the hands of the respondent, but they conceded that if the respondent insisted, then they would have to redeem the respondent; and thirdly, that Mr. Justice Foster was wrong

on the question of *res judicata*. Mr. Dube, for the respondent, disputed all these contentions.

Their Lordships will now refer to the various applications for execution in some detail.

On 22nd January, 1915, the decree-holders applied for execution of the decree of 10th July, 1896, whereby they prayed that the rent decree might be converted into a money decree and that Surendra be made one of the judgment debtors and they be allowed to take further proceedings in the execution case.

Surendra, on 27th March, 1915, alleged that he was not a representative of the judgment debtor's interest in the *pwtini*, and that the same had been extinguished by his purchase and that the decree was barred by limitation.

On the 19th March, 1917, the decree-holders on the footing of the decree being merely a money decree, applied for attachment of other properties belonging to Chatterpat Sing. Before this application was disposed of and on 4th August, 1917, the respondent, as has already been stated, had purchased the *pwtini mahal* in execution of his decree.

On 23rd November, 1918, the decree-holders, again on the footing of the decree being a money decree, applied for and obtained an order that certain personal properties of Surendra might be attached and sold and from such sale proceeds their claim be satisfied. On Surendra's application his properties were ordered to be released.

The decree-holders appealed against the order releasing Surendra's personal properties, and the appeal was dismissed on 24th March, 1922. In dismissing the appeal, Mr. Justice Das said that, in his opinion, it was open to the decree-holders to proceed against the *pwtini* tenure in the hands of the respondent. This observation of the learned Judge was unnecessary for the purposes of his decision and was in no way binding on the respondent, who had not been made a party to the aforesaid proceedings.

In the view that their Lordships take of limitation, it is unnecessary to decide any other questions involved in the appeal, and accordingly their Lordships express no opinion whatsoever on any of the other points decided by the High Court.

Their Lordships observe that, after the decision of the Judicial Committee in 1914, the decree-holders by their application of 22nd January, 1915, gave up the position that their decree created any charge on the tenure, and in all their subsequent applica-

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tions they attempted to execute the decree against properties other than the *puitni* tenure. They observe that on 19th March, 1917, the decree-holders, in their application against Chatterpat, applied for process against properties other than the *puitni*, and again on 23rd November they applied against Surendra for attachment and sale of properties other than the *puitni*. This course the decree-holders persistently took till the observation of Mr. Justice Das on 24th March, 1922, to the effect that it was open to them to proceed against the *puitni* tenure in the hands of the respondent.

Their Lordships have no doubt that the applications of 22nd January, 1915, 19th March, 1917, and 23rd November, 1918, were essentially different in character from the application of 9th May, 1908, and they are inclined to the view that the decree-holders had abandoned the application of 9th May, 1908, which proceeded on the footing that their decree created a charge on the tenure, but in any event they are clearly of opinion that the combined effect of these previous applications marks such substantial departure from the original application of 9th May, 1908, as to make it impossible to hold that the application of 22nd December, 1922, was a continuation of the application of 9th May, 1908.

Their Lordships are, therefore, clearly of opinion that the application of 22nd December, 1922, was a fresh application within the meaning of section 48 of the Civil Procedure Code and that the execution of the decree of 10th July, 1896, is barred by limitation.

They accordingly will humbly advise His Majesty that this appeal should be dismissed with costs.

Francis & Harter : Solicitors for the Appellants.

Watkins & Hunter : Solicitors for the Respondent.

K. J. R.

Appeal dismissed.

PRESENT: Lord Blanesburgh, Lord Darling, Lord Tomlin,
Sir John Wallis and Sir George Lowndes.

ALBERT BONNAN

v.

THE IMPERIAL TOBACCO COMPANY OF INDIA,
LIMITED.

[ON APPEAL FROM THE HIGH COURT, OF JUDICATURE AT
FORT WILLIAM IN BENGAL.]

Suit, maintainability of—Malicious prosecution of civil action—Damages for.

Quare as to the essential ingredients for the successful bringing of a suit for damages against defendant for maliciously and without reasonable or probable cause instituting a civil action against the plaintiff claiming injunction, etc.

The Quartz Hill Consolidated Gold Mining Coy v. Eyre (1) referred to.

Appeal No. 76 of 1928 by the Plaintiff, from a decree dated the 21st January, 1927 of the High Court, Calcutta, in its Appellate Civil Jurisdiction (*Rankin C. J.* and *C. C. Ghose J.*) reversing a decree of Mr. Justice Pearson dated the 25th January, 1926, whereby he directed an inquiry as to the damages sustained by the appellant by reason of various acts of the respondents complained of in the suit.

The material facts of the case appear fully from the exhaustive judgments of the Trial Judge and the Court of Appeal, reported in 46 Calcutta Law Journal 455. The proceedings at an earlier stage are reported in 1924 Appeal Cases 755; I. L. R. 51 Calc. 892 (P. C.) and I. L. R. 50 Calc. 762.

The present appeal to His Majesty in Council arose out of a suit by the appellant against the respondent Company for damages caused by the respondent Company in maliciously prosecuting a suit against the appellant.

The main question for determination was, whether the appellant's suit for malicious prosecution was, in the circumstances of the case, maintainable.

The Court of first instance (Pearson J.) held in the affirmative; but the decision was reversed on appeal.

The learned Chief Justice, in the Court of Appeal, held that the two suits brought by the respondent company against the

(1) (1883) 11 Q. B. D. 674.

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appellant could not support the appellant's suit for malicious prosecution, even if the former suits were maliciously commenced and prosecuted. He quoted (1) the following passage from the judgment of Bowen L. J. in *The Quarts Hill Case* (2) in support of his conclusion: " . . . The broad cannon is true that in the present day and according to our present law, the bringing of an ordinary action, however maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution."

The learned Chief Justice also held that the two suits brought by the respondent company against the appellant were not malicious but that there was reasonable or probable cause for them.

In the result the learned Chief Justice held that the appellant's suit failed, but he treated it as an application in the former suit, No. 1610 of 1922 for an enquiry as to the damage caused by the *interim* injunction made in that suit on the 11th May, 1922, and referred it to the Official Referee to ascertain the amount of such damage.

Mr. Justice C. C. Ghose in his judgment concurred with the learned Chief Justice.

Herbert du Parcq, K. C. and *S. Hyam* for the Appellant.

Sir D. M. Kerly, K.C., F.E. Bray and *J. H. Pickup* for the Respondents.

Their Lordships' judgment was delivered by

Sir George Lowndes:—The suit out of which this appeal arises is the offshoot of a case which came before this Board and was decided adversely to the present respondents (the then appellants) in May, 1924. The facts leading up to the litigation are fully set out in the report, *Imperial Tobacco Company of India, Ltd. v. Bonnan* (3); for the purposes of the present appeal they may be summarised as follows:—

The respondents, a limited company incorporated in India, but to a certain extent apparently subordinate to the British-American Tobacco Company, Ltd., in this country, who hold some 80 per cent. of the Indian Company's shares, had been importing and selling Wills' Gold Flake cigarettes upon monopoly terms in India since 1910, and had no doubt built up an exceedingly valuable trade. In 1921 the appellant (Bonnan) purchased some millions of genuine Wills' Gold Flake cigarettes from the British Army canteen authorities at a price which would enable

(1) (1927) 45 C. L. J. 455 (457).

(2) (1883) 11 Q. B. D. 674 (690).

(3) [1924] A. C. 755.

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him to undersell the respondents in the Indian market. He shipped a considerable quantity of these to India and offered them for sale in Bombay and Calcutta. He succeeded in disposing of his earlier consignments upon favourable terms, but subsequent arrivals were detained by the Indian Customs authorities at the instance of the respondents, who alleged that they were counterfeit. On the 11th May, 1922, after reference to the British-American Tobacco Company in London, the respondents instituted a suit in the Calcutta High Court against the appellant, claiming to be entitled to restrain him from selling his cigarettes there, and on the 22nd of May a similar suit was instituted in Bombay. In both suits applications were made by the respondents for an interim injunction. The injunction was granted in the Calcutta suit on the 11th May, 1922; in the Bombay suit the appellant gave a formal undertaking to the Court not to sell. In both cases the respondents also gave what has been described as "the usual undertaking in damages," which their Lordships understand to mean an undertaking to make good to the appellant in each of those suits any damages which the Court might hold to have been reasonably consequential on the action taken by the respondent if ultimately held to have been unjustified.

The Calcutta suit was prosecuted by the respondents up to this Board, and was finally disposed of in May, 1924, as above stated, it being held by their Lordships, in affirmance of the decrees of both Courts in India, that the appellant's cigarettes were genuine articles, lawfully acquired from the lawful manufacturers, and that as such the appellant (Bonnan) had a right to sell them in India.

The Bombay suit, which had been stayed pending the final decision of the Calcutta suit, was dismissed by consent in November, 1924.

No proceedings were taken by the appellant either in Calcutta or Bombay to enforce the undertaking in damages given by the respondents, but on the 21st January, 1925, he instituted in the Calcutta High Court the suit out of which the present appeal arises, claiming from the respondents damages (amounting in all to over seven lakhs of rupees) on the allegation that the former proceedings were taken maliciously without reasonable or probable cause. The trial Judge (Pearson J.) held that this had been established by the appellant; the Court of Appeal held that it had not, and the main argument before their Lordships has turned on this difference of opinion, it being now admitted by the

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appellant, that if the view taken by the Appeal Court is right, his suit, as a substantive claim for damages, must necessarily fail. It had been contended in India that proof of malice and want of reasonable and probable cause was not of the essence of such a suit as that brought by the appellant, but this contention was not pressed before their Lordships.

When the first consignment of the appellant's cigarettes arrived in Calcutta in March, 1922, the respondents seem to have consulted their local solicitors, who were evidently not prepared to advise legal proceedings. Mr. Abbott, the Chairman of the respondent Company, wrote to the British-American Tobacco Company in London, apprising them of the arrival of the competing goods, and giving them the name of the shipper (Boonan) and details of the mark upon the packages. In answer to this letter the respondents received a cable dated the 4th April, from Mr. Macnaghten, to the effect that the sale of these cigarettes would be an infringement of the respondents' mark, and suggesting certain steps that might be taken to prevent it. This was followed on the 10th April by a second and more explicit cable from Mr. Macnaghten, expressing disagreement with the Calcutta solicitor's advice, reiterating the opinion that the sale would be an infringement of the respondents' mark, and adding that he had taken the opinion of a well-known Counsel in England, who concurred. It appears that Mr. Macnaghten was a Director of, and the standing Solicitor to, the British-American Tobacco Company, and he is referred to by Mr. Abbott in his evidence as "our legal adviser in London."

At the trial before Mr. Justice Pearson the first cable of the 4th April was put in evidence by the appellant, but that of the 10th, though tendered at the hearing and referred to in the evidence, was rejected, apparently on the ground that it had not been duly disclosed, and the learned Judge, excluding this obviously important document entirely from his consideration, held that the respondents had no reasonable or probable cause for the institution of their suits and that malice had been established. In the Court of Appeal the cable of the 10th April appears to have been treated as being before the Court. Both the Chief Justice and Mr. Justice Ghose, before whom the appeal came, express themselves as unable to understand why it should have been excluded, and founding upon it as expressing the considered opinion of the respondents' competent legal advisers in London, they held that the respondents were entitled to act upon it.

Their Lordships are in general agreement upon this point with the learned Judges of the Court of Appeal. They think that on this question of reasonable and probable cause Mr. Macnaghten's second cable was clearly relevant and indeed of much weight. It may be that the respondents' legal advisers did not in the first instance realize its importance; and that its non-disclosure was wrong. But when once a question was raised (as it was by the appellant's counsel) as to the advice upon which the respondents had acted, and the first cable of the 4th April was put in evidence, the second cable of the 10th was clearly admissible. Reading the evidence of Mr. Abbott and of Mr. Ryan, the solicitor-secretary of the respondent Company, though their depositions may not be wholly satisfactory on other questions, their Lordships have no doubt that it was in reliance upon the expert advice so received from London that the proceedings were instituted, and that though, as the event proved, that advice was wrong, it would be impossible rightly to hold that the respondents in acting upon it had no reasonable or probable cause for the course they took.

Their Lordships having come to this conclusion, it is not material for them to consider what other conditions may be necessary to enable a plaintiff to succeed in a suit of this nature. There was much discussion in India, and some also before this Board, as to the principles to be deduced from the judgments in *The Quartz Hill Consolidated Gold Mining Company v. Eyre* (1). Their Lordships, however, make no pronouncement upon this aspect of the case, which may require further consideration on some future occasion.

With regard to the action of the Customs authorities, for which the respondents may well have been legally responsible, and by which it is at least probable that the appellant was damaged, it is only necessary to state that it has been held by both Courts in India that any claim under this head is barred by the provisions of the Indian Limitation Act, and this finding has not been contested here. Nor has the appellant questioned before their Lordships the appellate Court's finding that no case of slander of goods has been made out against the respondents, though on this part of the case the learned Judges appear to have dissented from the view of the trial Judge.

It only remains to consider a question which arose in connection with certain qualified relief allowed to the appellant by

(1) (1882) 11 Q. B. D. 674.

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the Indian Courts. Though it was held against him that his suit for damages could not as such be maintained, the learned Judges were prepared to treat the claim made by him as an application in the former suit (instituted by the respondents in Calcutta) for an inquiry as to damages arising from the grant of the injunction of the 11th May, 1922, as to which the respondents had given the undertaking already referred to, and a formal reference for this purpose was embodied in the decree of the Appeal Court. Neither the competence nor the propriety of this reference has been questioned by the respondents, but the appellant objects to the exclusion by the Appeal Court from the consideration of the Referee of one particular head of damage under which a large claim was made in the plaint.

It appears that at the date of the injunction the appellant had outstanding in the hands of his vendors a large quantity of cigarettes, no doubt intended for the Indian market, but on which only a deposit had been paid. On the 17th May, 1922, he wrote to his vendors, asking them to cancel the goods, as owing to the injunction he would be unable to dispose of them in India. This was confirmed by another letter of the appellant dated the 6th June, 1922, despatched only two days before the injunction was dissolved, and at a time when he knew (as the terms of the letter show) that his vendors were still prepared to keep the contract open. Under these circumstances the Appeal Court were of opinion that the cancellation was not due to the granting of the injunction, but was a voluntary act on the part of the appellant for which the respondents were not liable.

In this conclusion their Lordships concur. It is obvious that the appellant was not prepared to wait, even a short time, before giving final instructions for the cancellation, to see whether the injunction was to be continued as to future importations, nor did he care, on its discharge, to cancel his letter of the 6th June, as he could easily have done by cable. There may have been business reasons, quite apart from the injunction, making it prudent to cancel, such as the imminent approach of the monsoon, by which further importations might have suffered, or difficulties of finance.

Their Lordships also agree with the Court of Appeal that this question having been considered and decided against the appellant, ought not to be reopened before the Referee.

For the reasons above stated, their Lordships are of opinion

that this appeal fails, and they will humbly advise His Majesty that it should be dismissed. The appellant must pay the costs.

Sanderson, Lee & Co : Solicitors for the Appellant.

Frederic F. Macnaghten : Solicitor for the Respondents.

K. J. R.

Appeal dismissed.

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Albert Bonar
The Imperial Tobacco
Co. Company of
India, Limited.
Sir George Lowndes.

PRESENT : Lord Blanesburgh, Lord Darling, Lord Tomlin,
Sir John Wallis and Sir George Lowndes.

KUNWAR MUHAMMAD ABDUL JALIL KHAN AND OTHERS

KHAN BAHADUR MUHAMMAD OBAID ULLAH KHAN

AND OTHERS.

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June, 1929

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
ALLAHABAD.]

*Benami transactions—Civil Procedure Code (Act V of 1908), Sec. 66—Trans-
ferences from certified auction-purchaser—Transactions completed during
currency of section 317 of the old Civil Procedure Code (Act XIV of 1882),
whether affected by the new Code—Alternative cause of action based on pro-
prietary title acquired by the beneficial owner by 12 years' adverse possession.*

The effect of section 66 of the Civil Procedure Code, 1908, is not to make benami transactions illegal, but only to prohibit for reasons of public policy a suit against the certified purchaser on the grounds specified in the section : *Muzumdar Bukharu Kowar v. Lalla Bukharu Lall and Jakhoo Lall* (1) followed.

Quære, whether the provisions of section 66 of the present Code of Civil Procedure, prohibiting a suit against transferees from a certified purchaser, are applicable to a suit instituted after the commencement of the Code of 1908 against transferees from benamidars made when the corresponding section 317 of the Code of 1882 was in force.

While section 66, Civil Procedure Code, 1908, protects the certified purchaser, so long as he retains the possession given him by the Court, from a suit by the true owner, if he (the certified purchaser) allows the real purchaser, "being the true owner" to get possession, the section does not enable him to sue for possession, because possession has come into the hands of the true owner, who is entitled to it. In other words, where the certified purchaser sues as a plaintiff, it is open to the defendant, the real owner, if in

(1) (1872) 14 M. L. A. 496.

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possession, and if that possession has been honestly obtained, to defeat the suit by showing the real nature of the transaction: *Laksh Narsin Rty Choudhry v. Kalyapada Bandopadhye*, (1) relied on.

A fortiori, if the real purchaser, after having been allowed to remain in adverse possession for more than 12 years, is subsequently dispossessed by the certified purchaser, he is not precluded by section 66 from suing for recovery of possession on the strength of the title so acquired under the Limitation Act. It being unnecessary for him, in such a suit, to aver or prove as part of his cause of action that the auction purchase was made on his behalf, he cannot be regarded as suing "on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims" within the meaning of section 66; and the mere fact that the plaintiff as part of an alternative cause of action sets up and proves that the auction purchase was, in fact, benami does not render the provisions of section 66 applicable.

Appeal No. 82 of 1924 by the Plaintiffs, from a decree of the High Court, Allahabad (*Mears C. J.* and *Knox J.*), dated the 15th January, 1921, which varied a decree of the Second Additional Subordinate Judge of Aligarh, dated the 18th of July, 1917, and dismissed (with the exception as to a small part of the property claimed) the plaintiffs' suit.

The material facts of the case are set forth sufficiently fully in their Lordships' judgment.

The main question arising in the present appeal was whether the suit was barred by section 66 of the Code of Civil Procedure, 1908.

Although the benami auction purchases took place before the Civil Procedure Code of 1908 was enacted, the learned Judges of the High Court held that section 66 of the Code of Civil Procedure of 1908 applied and not section 317 of the Civil Procedure Code, 1882, which was in force at the time of the said auction sales, and upheld the Subordinate Judge's decision that section 66 of the Civil Procedure Code, 1908 barred the suit as far as the properties purchased at auction were concerned.

The learned Chief Justice, in delivering the judgment of the High Court, observed as follows:—

"The next question that arises is whether there is any statutory bar which prevents the plaintiffs from succeeding as regards those portions of villages Kakathal and Chakathal which were purchased at auction.

"As it has been suggested that section 66 of the Civil Procedure Code, 1908 imposes a wider disability on the plaintiffs than

section 317 of the earlier Code we must first of all decide by which section the rights of the plaintiffs must be determined.

"The transfers to Obaid Ullah Khan were made in 1900. The action was commenced in 1916. Dr. Sulaiman contends that the plaintiffs' rights must be judged, not by section 66, but by section 317 and that on the proper construction of that latter section, whilst Abdul Shakur Khan and Abdul Latif Khan would have been unable to maintain an action against Mahmud Ali Khan and Sirajul Haq they are nevertheless entitled to bring one against Obaid Ullah Khan, the transferee from Mahmud Ali Khan and Sirajul Haq. He contends that retrospective effect must not be given to the opening words of section 66, that the section relates to procedure and was not intended to cut down already vested rights of a plaintiff.

"With this view we do not agree. We are of opinion that the essential difference in the drafting of section 66 shows that the Legislature did not approve of the narrow construction of section 317 given to it by decisions of which *Sibta Kunwar v. Bhagoli* (1) is an example. We think that the section intended to make it clear that the Legislature, disapproving of 'benami' transactions, meant to prevent actions against certified purchasers and their transferees. To that extent, the Legislature did by section 66 deprive a plaintiff of a right which possibly was not previously negated. The plaintiffs' rights must in our view be judged by section 66.

"Dr. Sulaiman concedes that if this be so he cannot maintain the suit against Obaid Ullah Khan on the ground that the purchases made by Mahmud Ali Khan and Sirajul Haq were for the plaintiffs' benefit and he agrees that Obaid Ullah Khan must be regarded as a 'person claiming title under a purchase certified by the Court.' The learned Subordinate Judge came to the conclusion that the suit was barred so far as the properties purchased at auction were concerned, and we agree with him."

As regards the 5th issue, "whether the plaintiffs, by adverse possession extending over 12 years have become the proprietors of the properties in suit?" (which formed the sole basis for the decision of their Lordships of the Privy Council), the learned Judges of the High Court expressed no opinion, as the question was not apparently raised in argument before them, though one of the grounds of appeal was: "Because the plaintiffs' and their predecessors have been in actual possession of the property ever

(1) (1899) I. L. R. 21 All. 196.

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since the auction purchase and a suit for declaration of title even against the assignee of the certified purchasers is maintainable." The same contention was raised in the plaintiffs' application to the High Court for leave to appeal to His Majesty in Council, in ground No. 5 as follows "Because in any case as the plaintiffs' predecessor had been in continuous adverse proprietary possession for more than 12 years, their title had been perfected and the suit should have been decreed."

Dunne K. C. and *Wallack* for the Appellants.

DeGruyther K. C. and *Raihes* for the Respondents.

Dunne K. C.: The execution sales having taken place at a time when the Civil Procedure Code, 1882 was in force, the case was governed by section 317 of that Code. The High Court was wrong in giving retrospective effect to section 66 of the Code of 1908.

On the true construction of section 317 of the Code of 1882, there is no statutory bar to a suit against a transferee from a certified auction-purchaser. Three of the Indian High Courts held the view we are now contending for: *Theyyavelan v. Kochan* (1); *Sibha Kunwar v. Bhagoji* (2) and *Dukhadi v. Srimonte* (3). In Bombay the contrary view was taken; *Hari Govind v. Ramchandra* (4). We submit that the opinion of the majority of the High Courts is right and in accordance with the true interpretation of section 317.

[*Lord Blanesburgh*: There is no doubt that section 66 of the present Code is applicable and not section 317.]

The word "prescribed" in section 66, Civil Procedure Code, 1908 means "prescribed by rules", vide section 2, sub-section 16 of the Code.

[*Sir John Wallis* refers to the General Clauses Act, 1897, section 8, on the question of construction of references to repealed enactments.]

Order 21, rule 94 provides for the grant of a certificate to the person declared to be the purchaser, and shows how the certificate shall be made out. We submit that section 66 does not apply at all, and does not prevent the plaintiffs from bringing a suit against transferees from the certified purchaser. It has been held by the Calcutta High Court that sales prior to 1908 are still governed by the Civil Procedure Code 1882: *Promatha Nath Pal Chowdhuri v. Mohini Mohan Pal Chowdhury* (5).

(1) (1897) I. L. R. 21 Mad. 7.

(2) (1899) I. L. R. 21 All. 196.

(3) (1899) I. L. R. 26 Cal. 950.

(4) (1906) I. L. R. 31 Bom. 61.

(5) (1920) I. L. R. 47 Cal. 1108; 31 C. L. J. 463.

The section imposes a restriction upon the right of the owner to enforce his title, and must be construed strictly.

The words "in such manner as may be prescribed" in section 66 mean, prescribed by Rules under the Code. The High Court has power under section 122 to frame Rules.

[*DeGruyther, K. C.* : But no Rules on this point have been framed.]

[*Lord Tomlin* : Does section 317 remain in force as regards earlier transactions? Can you show that section 317 is still in force in regard to earlier transactions?]

[*Lord Blanesburgh* : Is there no saving section in the Code?]

[*Sir John Wallis* : There must be a saving clause somewhere, perhaps in the General Clauses Act.]

[*Sir George Lowndes* refers to section 156 of the Civil Procedure Code.]

[*DeGruyther K. C.* The only saving clause I can find is section 157.]

Refers to *Promatha v. Mohini* (1), a decision of three Judges. The sale there was in 1903 and confirmed in 1906 but not certified till 1909.

[*Sir John Wallis* : The same point was involved there as in the present case. See page 1111 of the report, where it is very clearly dealt with by Sir Asutosh Mookerjee, Acting C. J.]

[*Lord Blanesburgh* : Does the Act of 1882 remain in full force as regards transactions completed before 1908?]

[*Sir John Wallis* : This is a matter of procedure, and must be governed by the existing law.]

[*Lord Blanesburgh* : Has the decision in *Promatha v. Mohini* (1) ever been approved or dissented from?]

No. Section 66 only refers to transactions under the Code of Civil Procedure, 1908. Anyone who after the commencement of the Code of 1908 seeks the protection of section 66 must obtain a certificate under that Code.

[*Lord Blanesburgh* : Section 317 is repealed without qualification. The prohibition against maintenance of suits is withdrawn with the repeal of the statute.]

[*Lord Tomlin* : But the Act does not destroy existing rights. This is not an adjective provision. It is a substantive right.]

Section 317 created a vested right in the beneficial owner, and it could not be affected by the repeal of the Code. Section 317

(1) (1920) I. L. R. 47 Cal. 1108; 31 C. L. J. 493.

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created a substantive right in favour of the appellants (plaintiffs).

[*Lord Tomlin* : The repeal of the statute would not destroy the right.]

[*Sir George Lowndes* : The section does not in terms confer a right. It only takes away a right to bring a particular action.]

The object of section 66 of the new Code was to do away with the conflict of opinion between the different High Courts as regards suits against transferees from a certified purchaser.

[*Lord Tomlin* : What does "certified by the Court" in section 66 mean? I should take it to refer to any purchase certified by the Court, and not necessarily certified under the Code.]

I submit that "certified by the Court in such manner as may be prescribed," refers to, as prescribed "by this Code"; See the definition clause, section 2, sub-sec. (16).

[*Lord Blanesburgh* : "Prescribed" may mean as prescribed in future and refer to future cases, i. e., cases arising after the commencement of the Code.]

[*Sir John Wallis* "Prescribed" means "prescribed by Rules" There were no Rules under the old Code.

Now, as regards the alternative case set up by the plaintiffs, based on title by 12 years' adverse possession, we rely on section 28 of the Limitation Act. Under that section a man loses his title to property by lapse of the requisite period. We had *de facto* possession for 12 years. Time ran in our favour under Art. 144 of the Act.

[*Lord Tomlin* : What is the authority for the proposition that the benamidar cannot set up section 66 when he is suing the beneficiary who remains in possession?]

There are many cases on this point; see, *inter alia*, *Mussumat Bukhs Kowar v. Lalla Bukhoree Lall* (1); *Lokhe Narain v. Kalypuddo* (2); *Dukoda v. Srimonto* (3), laying down that the section is applicable only to a suit against a certified purchaser.

[*Sir John Wallis* : Section 317 does not prevent a benamidar from suing. It is suits against the benamidar which are interdicted.]

[*Lord Blanesburgh* : The decision in *Lokhe Narain v. Kalypuddo* (2) seems quite conclusive that the benamidar cannot turn out the beneficial owner.]

[*Sir John Wallis* : When the suit becomes barred by time, a title is conferred under the Limitation Act, section 28.]

(1) (1872) 14 M. I. A. 496; 10 B. L. R. 159.

(2) (1875) L. R. 2 I. A. 154.

(3) (1893) 1 L. R. 26 Calc. 950.

[*Lord Darling*: Statutes of Limitation assume that the person bringing the action has a perfectly good cause of action but that he cannot enforce it because he did not sue in time.]

Quite so, and section 28 of the Indian Limitation Act provides that his right is extinguished. If the beneficial owner is in possession for 12 years, he gets a statutory title under the Limitation Act, which he can actively assert by suit. He is no longer suing "on the ground that the purchase was made on his behalf" within the meaning of section 66 of the Civil Procedure Code, but he sues as an owner who has acquired a title under the Limitation Act.

The only bar under section 66 is against the maintainability of suits based "on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims"

DeGruyter K. C. for the Respondents: The question of possessory title was not raised before the High Court.

[*Lord Blanesburgh*: But it is mentioned in the written grounds of appeal to the High Court. Besides, the plaintiffs had adequately raised the question of possessory title before the Subordinate Judge.]

The High Court however does not go into this question at all. The point was not argued before the High Court whether the plaintiffs had an independent title apart from section 66 Civil Procedure Code.

We submit that the suit was not maintainable by reason of section 317 of the Civil Procedure Code 1882 or section 66 of that of 1908, whichever applied.

[*Lord Tomlin*: I have no doubt that certified purchaser in section 317 means a purchaser who holds a certificate under the Code of 1882.]

Their Lordships' judgment was delivered by

Sir John Wallis:—The parties to this suit are members of a Mahomedan family, and the plaintiffs sue to establish their rights as heirs of Abdul Shakur and Abdul Latif to certain properties in the villages of Chakathal and Kakathal, which are in possession of Obaid Ullah, the 1st defendant.

The deceased Abdul Shakur was the youngest of four brothers, Abdul Latif was the son of the eldest brother and Obaid Ullah is the son of a younger brother. The second and third defendants are widows who have been made parties as being among the heirs of Abdul Latif. The present appeal relates only to certain pro-

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erties in the aforesaid villages, which were purchased at Court auctions in execution of decrees by Mahmud Ali on the 20th April, 1885, and by Sirajul Haq on the 21st of March, 1892. On the 7th and 8th July, 1900, Sirajul Haq and Mahmud Ali executed sale deeds of these properties in favour of Obaid Ullah, the 1st defendant.

The plaintiffs' case is that the purchases at the Court auctions and the subsequent transfers were made *benami* for Abdul Shakur and Abdul Latif, who had provided the purchase money.

The plaintiffs further alleged that Abdul Latif, who died in 1909, and Abdul Shakur, who died in 1915, and the plaintiffs after them, had been in proprietary possession of these properties ever since the date of the Court auctions, and that by virtue of their possession for more than twelve years the plaintiffs had become absolute owners in possession of the properties in question.

It was admitted in the plaint that Abdul Latif, in April, 1909, some months before his death had executed a *wakfnama* of all his properties, but it was alleged that this *wakfnama* was a mere paper transaction, and was not binding on the plaintiffs.

The plaint also alleged that after the deaths of Abdul Latif and Abdul Shakur, the 1st defendant, in September, 1915, instituted suits for arrears of rent against tenants of the properties, and in May, 1916, instituted a suit for profits, which jeopardised the plaintiffs' rights, and made it necessary to institute the present suit.

They accordingly prayed for a declaration that they were the actual owners in possession of the suit properties, and for an injunction against the 1st defendant. The plaint was subsequently amended by including a prayer for possession in case the Court should be of opinion that the plaintiffs were not in possession.

The 1st defendant pleaded that as regards the properties purchased at Court auctions in the name of Sirajul Haq and Mahmud Ali, the suit was barred by section 66 of the Civil Procedure Code of 1908. He denied that the auction purchase was *benami*, and alleged that he and his transferors had all along been in possession. As regards the *wakf* created by Abdul Latif, the 1st defendant admitted the execution of the deed of *wakf*, and that he had attested it, and alleged that after the death of Abdul Latif he had been duly appointed *mutawalli* or trustee of the *wakf*, but he alleged that he was then unaware that the *wakf* deed included

properties of his own which had been purchased by Sirajul Haq and Mahmud Ali at the Court auctions, and subsequently transferred to him. He further pleaded that the plaintiffs were not entitled to sue in respect of the properties owned by the *wahf* unless the deed of *wahf* was cancelled.

The 2nd and 3rd defendants filed written statements in which they challenged the validity of the *wahf* and prayed that their interest as heirs of Abdul Latif should be protected. The issues material to this appeal were as follows :—

- (3) Whether the plaintiffs are in possession ?
- (4) Whether the claim is time barred ?
- (5) Whether the plaintiffs by adverse possession extending over 12 years have become the proprietors of the properties in suit ?
- (6) Whether section 66 of the Civil Procedure Code bars the suit ?
- (7) Whether purchases and acquisitions made by Sirajul Haq and Mahmud Ali Khan were really made by Abdul Latif Khan and Abdul Shakur Khan ?
- (8) Whether the sales in favour of the Defendant No. 1 were fictitious and the transactions were *benami* for Abdul Latif and Abdul Shakur ?
- (11) Whether the *wahfnama* executed by Abdul Latif was a genuine transaction or was it only a nominal one ?

As regards issues (3) and (4) the Subordinate Judge, whose findings of fact were accepted by the High Court found that plaintiffs were not in possession at the date of suit, but that they and those through whom they claimed had been in possession, "physical possession at any rate," down to the death of Abdul Shakur in 1915.

On the 6th, 7th and 8th issues, he found that the purchases and acquisitions made by Sirajul Haq and Mahmud Ali were really made by Abdul Latif and Abdul Shakur and that the sales by Sirajul Haq and Mahmud Ali to the 1st defendant were also *benami* for Abdul Latif and Abdul Shakur, but as regards the properties covered by the auction purchases, he held the suit was barred by section 66 of the Civil Procedure Code.

As regards the 5th issue the Subordinate Judge disposed of it by observing "the plaintiffs have pleaded in the alternative that if they had no title initially they acquired one by adverse possession. The finding of the Court being that in respect of the bulk of the property the owners were Shakur and Latif, no question of gain of proprietary title by adverse possession arises."

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The Subordinate Judge also held that the *wakf* created by Abdul Latif was a good and valid one, but that this was not a sufficient ground for refusing to give possession to the rightful heirs of the founder as the 1st defendant had taken possession of the *wakf* properties not as a duly appointed *mutwalli*, but as a mere trespasser.

In the result he decreed the suit except as to the properties which had been purchased *benami* at the Court auctions, and directed that as regards any questions arising between the heirs of Abdul Shakur and Abdul Latif the parties should be referred to a separate suit.

The plaintiffs appealed to the High Court and the 1st defendant filed cross-objections.

The High Court agreed with the findings of fact of the Subordinate Judge and approved of his reasons for holding that the suit was barred as regards the properties covered by the auction purchases. They held, however, that he was wrong in giving the plaintiffs a decree in respect of properties which were included in the *wakf* created by Abdul Latif, as the gift of those properties to the *wakf* had been duly perfected by Abdul Latif in accordance with the requirements of Mohammedan law, and as, after his death, the 1st defendant had been duly appointed *mutwalli* of the *wakf*.

They therefore dismissed the plaintiffs' appeal and allowed the 1st defendant's cross-objections as to the *wakf* properties.

As regards the properties which, according to the findings, were purchased at Court auctions by Sirajul Haq and Mahmud Ali *benami* for Abdul Shakur and Abdul Latif, and were subsequently transferred to the 1st defendant, Obaid Ullah *benami* for them, both the lower Courts were of opinion that the suit was barred under section 66 of the Civil Procedure Code of 1908 on the ground that it was a suit against a "person claiming title under a purchase certified by the Court.....on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims." The present section says that "no suit shall be maintained against any person claiming title under a purchase certified by the Court," whereas the wording of the corresponding section 317 of the Code of 1882 was "no suit shall be maintained against the certified purchaser," and the alteration was admittedly made because it had been held by the Calcutta, Madras and Allahabad Courts that the section only prohibited suits of this nature instituted against the cer-

tified purchaser himself and did not prohibit them when instituted against transferees from him, whereas in Bombay it was held that it did. In these circumstances, it has been held in Calcutta that the provisions of section 66 of the present Code in so far as they prohibit suits on the ground specified in the section, do not apply to suits against transferees from *benamidars* made when section 317 of the Code of 1882 was in force, and it has been contended before their Lordships on the authority of that decision that the lower Courts were wrong in applying the provisions of section 66 of the Code of 1908 to the present case.

Their Lordships do not propose to deal with this question, because, in their opinion, assuming the Courts to have been right in holding that the case must be dealt with under the provisions of section 66 of the present Code, they are of opinion that the plaintiffs are entitled to succeed on their alternative cause of action, which is the subject of the 5th issue, viz., their dispossession by the 1st defendant after they had been in possession for more than twelve years, a contention very briefly dealt with by the Subordinate Judge and not mentioned by the High Court, though it was one of the grounds of appeal and was taken again in the application for leave to appeal to His Majesty in Council.

In dealing with these questions their Lordships think it desirable in the first place to refer to *Mussumat Buhuns Kowar v. Lalla Buhoorie Lall and Johhee Lall* (1), a decision of this Board on the corresponding section of the Code of 1859, which is the leading authority as to the scope of the section. It was held in that case that the effect of the section was not to make these *benami* transactions illegal, but only to prohibit for reasons of public policy a suit against the certified purchaser on the grounds specified in the section; and in *Lohhee Narain Roy Chowdhry v. Kalypuddo Bandopadhyaya*, (2) it was expressly ruled by this Board, following that decision, that where the certified purchaser is a plaintiff, the real owner, if in possession, and if that possession has been honestly obtained is not precluded by the section from showing the real nature of the transaction.

Now it is clear under these rulings that, while the section protects the certified purchaser, so long as he retains the possession given him by the Court, from a suit by the true owner, if he allows the real purchaser "being the true owner" to get possession the section does not enable him to sue for possession, because

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possession has come into the hands of the true owner, who is entitled to it.

If then the true owner is subsequently dispossessed by the certified purchaser, is he precluded by the section from suing for recovery of possession? That must depend on the question whether he is to be regarded as suing "on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims" within the meaning of the section. In such a case, if the true owner has been in possession for less than twelve years, he will no doubt have to aver and prove as part of his cause of action that the auction purchase was made on his behalf, but that is not the case here, and their Lordships express no opinion about this question as it has not been argued before them.

Where, however, as in the present case, the real purchasers have been allowed to remain in adverse possession for more than twelve years before dispossession, they are entitled to sue for possession on the title so acquired under the Limitation Act, and it is unnecessary for them to aver or prove that the auction purchases were made on their behalf.

In their Lordships' opinion the provisions of section 66 of the Code of Civil Procedure and the corresponding sections of the earlier Codes have no application to such a case.

A suit based on dispossession after twelve years' adverse possession is clearly not a suit "on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims" within the meaning of the section, and does not become so merely because the plaintiff as part of an alternative cause of action sets up and proves that the purchases were, in fact, *benami*.

The plaintiffs are therefore entitled to succeed as regards the properties which were included in the auction purchases, except in so far as they are included in the *wakf* created by Abdul Latif in 1909. It has been found by both Courts that the gift to the *wakf* was duly perfected according to the rules of Mahomedan law and by the High Court that the 1st defendant was duly appointed *mutawalli* or trustee of the *wakf* after the founder's death and the plaintiffs' claim to the *wakf* properties has therefore been rightly disallowed.

In these circumstances the appeal must be allowed and the decrees of the lower Courts varied by giving the plaintiffs a decree for the properties covered by the auction purchases and not

included in the *waqf*, but in the circumstances their Lordships are of opinion that the plaintiffs should only recover half their costs in the Courts below and here, and they will humbly advise His Majesty accordingly.

S. L. Palak : Solicitors for the Appellants.

T. L. Wilson & Co : Solicitors for the Respondents.

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Appeal allowed.

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PRESENT : *Viscount Dunsin, Lord Carson and
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Mesne profits—Terminus a quo—*Civil Procedure Code (Act XIV of 1882),
Sec. 211—Ascertainment of mesne profits—Decree, if joint and several.*

A, B, C, members of three different families, were in possession of certain mouzahs. These properties disappeared under the Ganges. After a considerable period of years, they reappeared and when they reappeared they were in juxtaposition to some property held by the Government. The Government assumed that the land which had come out of the Ganges was an accretion to their property and proceeded to put tenants upon it. On application by B, who had only 6 annas share in the property, to the Collector, the mouzahs were released. B was accordingly put in lawful possession of the whole lands. When the Government had been there they let the lands in putni to S. When B got possession of the land, he allowed S to remain as putnidar. A and C then brought a suit for declaration of title to the lands and for recovery of possession and mesne profits. The suit was decreed :

Held, that the expression "The claim of this suit be decreed with costs and mesne profits" meant that the mesne profits were to be allowed up to the date of the readmission of the plaintiffs to the land and were to be calculated on what the defendants actually themselves received as rent from the land let.

That the decree was not a joint and several decree. The decree was to be construed *applicando singula singulis*.

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Kumar Hemendra
Kumar Roy.

February, 14.

Privy Council Appeal No. 156 of 1927 by the Defendants.

The material facts appear from the judgments of their Lordships.

The judgment of their Lordships was delivered by

Viscount Dunedin :—This is a case which has arisen out of one of those curious effects of nature which have often been before the Board, namely, the behaviour of the Ganges. There were three families who, for brevity's sake, have been named the Kundu set, the Mukherjee set and the Roy set. They were three families of zemindars who were in joint possession of certain mouzabs called Durlabhpur in Jirat and Hatikanda. They were in joint possession in law. It was quite true that they had a separate towzi number, but that makes no difference to the legal character of the possession. These properties disappeared under the Ganges. After a considerable period of years they reappeared and when they reappeared they were in juxtaposition to some property held by the Government. The Government assumed that the land which had come out of the Ganges was an accretion to their property, and proceeded to put tenants upon it, but after a certain time the zemindars woke up to the fact that it might be their property that had reappeared from under the Ganges, and, accordingly they took the ordinary steps, namely, an application to the Court of the Collector. Originally the two sets, the Roy set and the Kundu set, made applications, but the Roy set did not persevere, and there is a copy of the order sheet in the Court of the Collector in which, dealing with the Roy application, it says :—"The notice-givers took no steps to establish their right to the lands claimed by them as a reformation in situ. On the other hand the Kundu Babus of Mouri have succeeded in establishing that Government has no right to the mouzabs of Jirat and Durlabhpur." Accordingly, there is on the other order sheet a certified copy of order or release in which the Collector says : "I accordingly order that the lands included within the Revenue Survey boundaries of Char Jirat and Durlabhpur as shown in exhibits A and A (2) be released." That put the Kundu people in lawful possession of the whole of the lands. It is quite true that they, although in lawful possession of the whole of the lands, were not really in one sense in lawful possession because they had, as regards the other two families, only a right to a 6 annas share ; the other 10 annas share being in the right of the other two families.

When the Government had been there they had thought that

the best way to deal with the land was to let it in putni to a person of the name of Srish. Srish seems to have worked the land well and settled cultivators upon it, and he paid his putni to the Government. When the Kundu family got possession of the land under the lease they thought that the best plan that they could adopt was to continue Srish and continue Srish they did.

After a little while the other two families woke up to the fact that as the lands had been recovered, and as they had a right to a 10 annas share of it, they had better make effectual their right, and accordingly they raised action for that purpose. That action was defended by the Kundus. The first Judge gave judgment in favour of the plaintiffs; then there was an appeal in which that judgment was reversed and then there was an appeal to the Privy Council which restored the judgment of the first Judge.

That suit was for the recovery of the land and mesne profits. The suit was brought against everybody who was found there; it was brought against the Kundus; it was brought against the Government and a certain gentleman connected with the Government who had had partial possession of land before the period at which the Kundus were readmitted, and it was also brought against Srish, who was found to be the person in actual possession. The decree in that suit was as follows:—"It is ordered that the claim of this suit be decreed with costs and mesne profits and interest against the principal defendants and the defendants subsequently added. . . . The amount of mesne profits to be ascertained in execution.

The questions that are now before their Lordships arose when the amount of mesne profits had to be ascertained in execution. Two questions arose in connection with that. The first is as to the period for which the mesne profits should be allowed. The terminus a quo, so far as these particular defendants are concerned (because it is only the Kundu defendants that are here), was, of course, when they were first readmitted to possession, but the terminus ad quem might either be the raising of the suit or the time when the plaintiffs got decreed to them the right to be on the lands. Upon that the High Court have held that mesne profits must go to the further period and this appeal is first against that.

Their Lordships think that this matter is really decided by

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authority. "That the claim of this suit be decreed with costs and mesne profits" has been decided to mean profits up to the time of the plaintiffs' readmission to the land. The argument on the other side was that when you looked at what was actually claimed in the plaint, the plaint had said: "Suit for declaration of title to and for recovery of possession of immoveable property and mesne profits, valued at Rs. 7,545", and then when you come to the statements, in paragraph 9, the value of the land is put at Rs. 6,156, and then it goes on to say: "The mesne profits amount to Rs. 1,389-5-8 as per accounts given below". Now, that Rs. 1,389-5-8 is only a calculation up to the time of the institution of the suit. Although that is so, inasmuch as the decree is "with costs and mesne profits" it has been held in many cases and cannot be gone back upon that, section 211 of the Civil Procedure Code having said that: "When the suit is for the recovery of possession of immoveable property yielding rent or other profit the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made or until the expiration of three years from the date of the decree (whichever event first happens)" a decree in this form is an exercise by the Court of that power under section 211. Their Lordships are, therefore, clearly of opinion that on this first point the appeal fails.

Now, the second point is: On what basis the mesne profits are to be computed. The same section 211 gives an explanation of what "mesne profits" are. Mesne profits of property "mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits". Undoubtedly in the lower Court the principal argument seems to have turned upon a contention which does not commend itself to their Lordships. It was argued seemingly that the true criterion was not what the person in possession got but what the person who was out of possession might have got if he had been there, and it was said that inasmuch as you were a zemindar you would not have cultivated yourself; you would have taken a rent; here is the rent which is given by Srish, and, therefore, that ought to be the proper criterion. That argument was quite rightly put aside. But then there is another argument. Mr. Upjohn wished their Lordships to think that this other argument which will be stated

presently was never started until the parties got before this Board. Their Lordships do not think that can be said, because in the judgment of the High Court this was said :—

“The second question now arises for consideration, namely, upon what basis are such mesne profits to be ascertained? In this connection the respondents have relied upon two main contentions : (1) That the plaintiffs are entitled to recover from the defendants only such profits as the plaintiffs using reasonable diligence could have made if they had been in possession of the lands and inasmuch as the plaintiffs are either zemindars or putnidars and would not themselves have worked as cultivators of the land, they are only entitled to recover mesne profits upon a rental basis.”

That is the argument which has already been mentioned as not being worthy of very much attention. But then the learned Judge goes on :—

(2) That each of the judgment debtors is liable only for the portion of the mesne profits that he actually received or with reasonable diligence might have received during the period in which he was in wrongful possession, that is to say, the person in actual possession is liable only for the nett profit which he received after deducting working expenses.”

Now, the question which was directly raised by the appellants here is this : He says : I am only liable for what I really got, namely, what I got from Srish ; allowing Srish to go on as he had done with the Government was perfectly reasonable ; you cannot think that it was necessary for me to put out Srish and begin to cultivate myself, and therefore I, in the terms of the Code, am only liable for what I really got.”

Mr. Upjohn has argued the case with his usual ability and more than his usual ingenuity, and it comes to this : He begins with the decree and he says that was a decree for joint and several liability. Then he says : “Oh, these people really did not take this point sufficiently.” Well, they may not have taken it sufficiently in the first Court because their Lordships think they rather wandered into the question which they have already dealt with, but their Lordships think it is perfectly clear from what has been read of the judgment that they took it in their second point referred to by the High Court.” Then the argument proceeds thus :—

The judgment was against them, and it was against them upon

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this theory, that these people were all trespassers; not only were the Kundu defendants trespassers but Srish was a trespasser. He was put in by the Kundus; the Kundus had no real right, and therefore, he had not a right. Accordingly as the decree was for joint and several liability you may take the mesne profits upon the calculation of what Srish got out of the land, and get decree against all the others for that amount. Their Lordships have great difficulty in looking upon Srish as a trespasser, or, for that matter, in one sense, even the Kundus as trespassers, because they were in possession of the land and on the only legal title to it which existed, namely, the lease from the Government. It is quite true in one sense that they were in wrongful possession because they were taking the whole profits, whereas they were only entitled to 6 annas of the profits and not to 16 annas of the profits. Be that however as it may their Lordships cannot accept this argument. They do not view the decree as a proper joint and several decree. They think it is to be construed *applicando singula singulis*. Let this test be taken: Suppose any one of the numerous defendants had refused to quit possession, could all the other defendants have been put in prison because that one defendant was in contumacy to the decree? What authority is there for saying that under such a decree as against any one particular defendant you are entitled to say: I will hold you liable not for the mesne profits which you got according to the terms of the Act, but, for the mesne profits which somebody else got and with whom, under the decree, you are liable? Their Lordships think it would be the height of injustice to hold that and they do not see that they are bound to hold it.

Therefore, their Lordships think that the basis of the judgment of the High Court here fails and that dealing with these Kundu defendants, and with them alone, their liability is just exactly what it is said to be by section ~~xi~~ of the Civil Procedure Code *viz.*, that which they themselves received, no case having been made that they by ordinary diligence could have got any more.

The result is that upon this second point their Lordships are of opinion that the appeal succeeds.

Their Lordships will, therefore, humbly advise His Majesty to declare that the mesne profits to be allowed up to the date of the readmission of the plaintiffs to the land but are to be calculated only on what the defendants actually themselves receiv-

ed as rent from the land let. There will be no costs either before this Board or in any of the Courts below as this has been a divided success, and any costs paid must be repaid.

A. T. M.

Appeal allowed in part.

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Viscount Darnley.

CIVIL REFERENCE.

Before Sir George Claus Rankin, Knight, Chief Justice, Mr. Justice C. C. Ghose and Mr. Justice Buckland.

IN RE GOOPTU ESTATE LIMITED*

Income tax—Salami—Lease—Forfeiture clause—Waiver—Resettlement—Income Tax Act (XI of 1922), Secs. 9, 10.

Where the *assessee* is the owner of property consisting of any building or land appurtenant thereto, the statute charges him upon the basis of a notional income the amount of which is computed by finding the *bona fide* annual value and making the deductions therefrom which are allowed by section 9 of the Indian Income Tax Act. Where the *assessee* has only a limited interest, namely, the interest of a lessee for 50 years, section 9 may be inapplicable. If the circumstances are not such that the *assessee* can be regarded as carrying on a business in house property, the *assessee* cannot be made liable upon principles which are applicable only to persons carrying on business:

Where the letting out of property upon lease for *salami* and for rent, the forfeiting of lease where possible and the exaction of fresh *salami* and increased rent are all acts done in the carrying on or carrying out of a business in house property, that sum was earned as part of a *profits* of the business, and is assessable accordingly to tax: *Commissioner of Taxes v. Melbourne Trust Limited* (1) and other cases. But the *assessee* will be entitled to the allowance in respect of depreciation on buildings, machinery, plant or furniture prescribed by cl. (vi) of sub-section (2) of section 10. "Profits" implies a comparison between the state of a business at two specific dates usually separated by an interval of a year, and if the company is to be regarded as dealing in house property by letting out for premium and rent in the course and for the purpose of its business, the money value of the extent to which at the end of a year it had bettered its position by such means will be assessable as profit: *In re Spanish Prospecting Co.* (2). If its position has been bettered by other means, from causes not directly connected with the business of the company, the

* Reference under section 66 (2) of the Income Tax Act.

(1) [1914] A. C. 1001.

(2) [1911] 1 Ch. 92 (98).

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enhanced value though realised is not part of the profits of the business : *Californian* case (1). Everything depends upon what the business is.

If the expenditure required to obtain the income from the capital asset is negligible the case is a case of a man in receipt of a clear revenue therefrom. If some considerable expenditure is necessary before the annual return can be obtained then the history of the year will be stated in the form of a "Trading" of "Revenue" Account or account of the receipts and expenditure during the year. It is essential when accounting on this basis to exclude from either side of the account matters which in substance represent only a rise or fall in the value of the asset from which revenue is derived as distinct from the net revenue itself or which represent only a change in the form of the investment, whether the change be a change into money or into some other form of property.

Cases of *Saleesi* or premium upon a lease may present considerable difficulty in maintaining the distinction between capital and revenue accounts.

The *assessee* were a limited company who in 1922 took a lease for 50 years from the representatives of R of certain properties which included the premises known as 100 Clive Street, Calcutta. This lease was subject to a building lease previously granted in June, 1920, by the executors of the will of R, whereby the premises 100 Clive Street were demised for 50 years to the Tata Industrial Bank Limited on a monthly rent of Rs. 5,000. The Tata Industrial Bank Limited had paid a premium or *Saleesi* of one lac of rupees and by the terms of the lease had undertaken to demolish the building then standing on the demised premises and to erect thereon a new office building in accordance with conditions to be approved by the lessors. In August, 1923, the Tata Industrial Bank Limited having expended a large amount of money upon the erection of the new building went into voluntary liquidation for the purpose of a scheme of amalgamation with the Central Bank Limited. Thereupon the *assessee* taking advantage of a forfeiture clause in the lease of 1920, which gave power to the lessors to re-enter if the Tata Industrial Bank Limited should go into liquidation, claimed to determine the lease and demand immediate possession. The Central Bank of India Limited, faced with this claim, compromised with the *assessee* who waived the forfeiture and agreed to a transfer of the lease to the Central Bank Limited in consideration of a lump sum payment of one lac of rupees and a further monthly payment of Rs. 750 during the residue of the lease. The sum of one lac was paid by the Central Bank Limited to the *assessee* on the 21st December, 1923. Income tax authorities for the year of assessment 1927-28 claimed to treat this sum as part of the assessable income of the *assessee* :

Held, that the sum of one lac of rupees paid by the Central Bank was to be regarded as a *Saleesi* or premium in the ordinary sense but could not be treated as an assessable income.

Reference under section 66 (2) of the Income Tax Act by the Commissioner of Income Tax, Bengal.

Messrs A. K. Roy, Sukumar Mitter, and Susil Sen for the *Assessee*.

The Advocate-General and *Dr. Radha Binode Paul* in support of the Reference.

The following judgments were delivered.

Rankin C. J. : The assessee is a limited company (Gooptu Estate Limited) who in 1922 took a lease for fifty years from the representatives of one Ram Chunder Gooptu of certain properties which included the premises known as 100 Clive Street, Calcutta. This lease was subject to a building lease previously granted in June 1920, by the executors of the will of the said Ram Chunder Gooptu, whereby the premises 100 Clive Street were demised for 50 years to the Tata Industrial Bank Limited on a monthly rental of Rs. 5,000. The Tata Industrial Bank Limited had paid a premium or *salam* of 1 lakh of rupees and by the terms of the lease had undertaken to demolish the building then standing on the demised premises and to erect thereon a new office building in accordance with conditions to be approved by the lessors. In August 1923 the Tata Industrial Bank Limited having expended a large amount of money upon the erection of the new building, went into voluntary liquidation for the purpose of a scheme of amalgamation with the Central Bank Limited. Thereupon the assessee, Gooptu Estate Limited, taking advantage of a forfeiture clause in the lease of 1920 which gave power to the lessors to re-enter if the Tata Industrial Bank Limited should go into liquidation, claimed to determine the lease and demand immediate possession. The Central Bank of India Limited, faced with this claim, compromised with the assessee who waived the forfeiture and agreed to a transfer of the lease to the Central Bank Limited in consideration of a lump sum payment of Rs. 1,00,000 and a further monthly payment of Rs. 750 during the residue of the lease. The sum of 1 lakh was paid by the Central Bank Limited to the assessee on the 21st December 1923. Income Tax authorities for the year of assessment 1927-1928 have claimed to treat this sum as part of the assessable income of the assessee and the Commissioner of Income Tax, Bengal, has at their request referred to this Court the following questions of law :—

(1) Whether the sum of Rs. 1,00,000, having been received in consideration of the waiver of their rights in connection with a breach of the lessee of a vital condition of the lease, is in the circumstances a casual gain or a non-recurring income within the meaning of section 4, sub-section 3 clause 7, of the Income-Tax Act.

(2) Whether the said sum Rs. 1,00,000 was a *salam*, and

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whether even assuming that it was a *salam*, it is an assessable income within the meaning of the Income-Tax Act or is a capital or capital and casual non-recurring receipt as held in the case, *Raja Shiva Prasad Singh v. The Crown* (1).

(3) Whether the income derived accrued and received in the year 1923 can in the circumstances, viz., the transfer of the amount from one account to another to suit the convenience of accountancy be treated as assessable income in the year 1927-28.

I propose to consider the second question first. The assessment order dated the 30th November, 1927 has been included in the paper book and from this as well as from the case stated, it appears that the assessment was made under section 12 of the Act under the head "other Sources." The assessment order shows that the assessment being under section 12, and not under the head "business," the Income-tax authorities have refused to permit the assessee to take credit for any sum on account of depreciation of the buildings etc. which are part of their capital assets.

In a case of this character much may depend upon the particular head of charge under which the assesses are being brought, and the question before us is not to be decided under section 9, 10 or 11 of the Act. Where the assessee is the owner of property consisting of any buildings or land appurtenant thereto, the statute charges him upon the basis of a notional income the amount of which is computed by finding the bonafide annual value and making the deductions therefrom which are allowed by section 9. As the assesses in this case have only a limited interest, namely the interest of a lessee for fifty years, the Income-tax authorities may well be right in regarding section 9 as inapplicable to the case. Again, if in the view taken by the Commissioner the circumstances are not such that the assesses can be regarded as carrying on a business in house property a view which has not been questioned before us and which must clearly be accepted it is obvious that the assesses cannot be made liable upon principles which are applicable only to persons carrying on business.

If we were dealing with this case under section 10 of the Act, and upon a finding that the letting out of property upon lease for *salam* and for rent, the forfeiting of leases where possible and the exaction of fresh *salam* and increased rent were all acts done in the carrying on or carrying out of a business in house property

it might well be correct to have that the sum now in question. was earned as part of the profits of the business, and was assessable accordingly to tax : *Commissioner of Taxes v. Melbourne Trust Limited* (1) ; *In re Spanish Prospecting Company* (2) ; *Assets Company Limited v. Forbes* (3). On the other hand on that view the assessee would be entitled to the allowance in respect of depreciation on buildings, machinery, plant or furniture prescribed by clause (vi) of sub-section 2 of section 10.

From this standpoint "profits" as Lord Moulton observed in *In re Spanish Prospecting Co.* (2) implies a comparison between the state of a business at two specific dates usually separated by an interval of a year, and if the company was to be regarded as dealing in house property by letting it out for premium and rent in the course and for the purposes of its business, the money value of the extent to which at the end of a year it had bettered its position by such means would be assessable as profit. If its position was bettered by other means, from causes not directly connected with the business of the company, the enhanced value though realised is not part of the profits of the business : *Californian case* (4) ; *Tubruan case* (5). Everything depends upon what the business is.

If however the assessee is not carrying on a business the matter must be examined from another angle. The absence of any provision in section 12 of the Act for an allowance of depreciation fixed capital is an indication of the difference. It points to the fact that under this head the income can prima facie be ascertained without a valuation of all assets at two different dates and by means of a computation of receipts and expenditure into which the rise or fall of capital values does not enter. If the expenditure required to obtain the income from the capital asset is negligible the case is the simple case of a man in receipt of a clear revenue therefrom. If some considerable expenditure is necessary before the annual return can be obtained then the history of the year will be stated in the form of a "Trading" or "Revenue" Account or account of the receipts and expenditure during the year. It is essential when accounting on this basis to exclude from either side of the account matters which in substance represent only a rise or fall in the value of the asset from which revenue is derived as distinct from the net revenue itself or which

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(1) [1914] A. C. 1001.

(2) [1911] 1 Ch. 92.

(3) (1897) 3 T. C. 542

(4) (1904) 5 T. C. 159.

(5) (1910) 5 T. C. 658.

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Rubin, C. J.

represent only a change in the form of the investment, whether the change be a change into money or into some other form of property.

Now cases of *salam* or premium upon a lease may present considerable difficulty in maintaining the distinction between capital and revenue accounts. In *Raja Shiva Prasad's* case (1) Dawson Miller C. J. discussed the question in the case of a holder of an impartible Raj who possessed zemindari properties. The case before us is the case of a company and apparently of a company which possesses a good many leasehold properties. But under section 12 of the Act and upon the facts stated in the case I do not see how a different result can be arrived at from that which would have been correct had the lease of 100 Clive Street been the sole capital asset of an individual. Section 12 covers many different types of income but even if it be assumed that such matters would affect the question, the case stated contains no findings as to the character or constitution of the company, the purpose for which it was formed, the extent of its operations or the particular character of the transaction by which the representatives of Ram Chandra Gooptu deceased with the assent of the beneficiaries under his will have demised his properties to Gooptu Estate Ltd. We know indeed that the assessee company is not said to be carrying on a business and it may be, for ought we know, that it has been formed merely to provide convenient machinery for management or as a scheme by which the testator's estate can be administered and in the end distributed to the best advantage.

Looking at the assessee therefore simply as owning leasehold property from which they derive a revenue, we find as regards 100 Clive Street, that they are charged and chargeable under section 12 with the whole of the rent notwithstanding that it is derived from a wasting asset. They have a lease for fifty years from 1922 and the property is sublet for fifty years from 1921. In 1923 when the Tata Industrial Bank incurred a forfeiture of their lease the assessee instead of being interested merely as reversioners entitled to the rent reserved during the currency of the lease became at one stroke entitled to immediate possession of the property as it then stood. Then investment or capital asset had advanced suddenly in value and they were free to deal with it as they liked, subject only to the covenants in their own lease. Had they sold it no part of the purchase price could have been regarded as revenue. Had they sold a half share in it the same

(1) (1924) I. L. R. 4 Pat. 73.

would still hold. What then did they do? By a bargain with the Central Bank they contrived to the extent of a lac of rupees to realise the *enhanced* value at once and the rest of the enhancement in value of their asset they converted into a right to an additional monthly sum of Rs. 750. The finding by the Commissioner is that the lac of rupees was "in the nature of a *salami* or premium" and he adds "paid in consideration of the Central Bank being allowed to replace the original lessee." These last words are not very lucid because the sum was not exacted as a term of mere assent to an assignment but by reason of the claim that the lessee had incurred a forfeiture and in consideration that the forfeiture was waived. The sum in question is certainly to be regarded as a *salami* or premium and that in the ordinary sense. It was demanded and paid in respect of re-settlement of this property not for a year or even for a few years only but for the remaining 48 years out of the 49 years which exhausted the assesses' leasehold interest. I do not say that *salami* can never be income under section 12 but it would in my opinion be highly unreasonable to treat any part of this *salami* as income. The very logic by which the Act has excluded from the account any allowance for depreciation of this wasting asset excludes this item also. Neither has place in a revenue account, if the account be strictly limited to its immediate purpose.

In my opinion the second question referred to us should be answered in favour of the assesses. In this view the other questions do not arise and need not be discussed.

The assesses must have their costs of the Reference.

C. C. Ghose, J: I agree.

Buckland, J: I agree.

A. T. M.

Reference answered in favour of the assesses.

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APPEAL FROM ORIGINAL CIVIL

*Before Sir George Claus Rankin, Knight, Chief Justice
and Mr. Justice C. C. Ghose.*

CIVIL.

1930.

April, 11.

PANCHANAN BANERJEE AND ANOTHER

v.

SURENDRA NATH MUKERJEE AND OTHERS.*

Declaratory suit—Hereditary shebaitship—Stranger—(Claimant to shebaitship—Heir of the founder—Will—Dedication by testator's heirs—Arrangement by which shebait gave up his right—Shebait, if can sell his office for his pecuniary benefit—Analogy to surrender by Hindu widow—Person, if can be compelled to accept the office of shebait—Adverse possession—Limitation Act (IX of 1908), Sec. 28 Sch. I Art. 124—Co-owner's possession, when adverse.

One Ramchand Mukherjee died in 1862 leaving a Will by which he left a legacy of Rs. 30,000 to an Idol, and provided that his sons would act as shebait for their lifetime and after their death his grandsons will get absolutely the shares of their respective fathers. Ram Chand left 3 sons, Panchanan, Ramlal and Soshibhusan. There was litigation between the 3 brothers as the result whereof Ramlal's interest in the properties was purchased by Panchanan in 1879. Subsequently in 1881 there was an agreement between Panchanan and Soshibhusan to give over certain properties to the Idol in satisfaction of the legacy. Panchanan died sonless. From 1881 till the date of suit Ramlal or his branch did not take any part in the Shoba. Soshibhusan exclusively performed the worship and managed the debutter properties. In 1897 Soshibhusan removed the Thakur from the temple to his own dwelling house. In 1911 Soshibhusan died leaving a Will by which he nominated one Ramsevak Mukherjee his grandson by a predeceased son to be the shebait. Ramsevak acted as shebait from 1911 till 1923 when he died leaving a widow Mayabati Debi and a Will by which he nominated his sister's son Panchanan the plaintiff to be the next shebait. After Ramsevak's death, there were testamentary proceedings in the course of which Mayabati Debi withdrew her caveat and received the sum of Rs. 20,000 in satisfaction of her right of residence and maintenance and all other claims including claim to the Debutter estate.

In a suit by Ramsevak's nominee Panchanan Banerjee against the heirs of Panchanan and Ramlal and Ramsevak's widow Mayabati for a declaration that he was the sole shebait and that the defendants were not the lawful shebait of the Idol:

Held, the plaintiff could not succeed in his suit, as he was a mere stranger to the shebaitship and the dedicated properties.

In order to be entitled to succeed to hereditary shebaitship, it is not necessary to show that the claimant is one of the heirs of the founder himself. It is enough if he can make out that he is the heir of the last shebait: *Kanjamani v. Nihari Behari* (1) followed.

* Appeal from Original Decree No. 84 of 1928, arising out of Original Suit No. 1853 of 1927.

(1) (1915) 23 C. L. J. 404 (408).

The rights of the parties in this suit were to be governed by Ramchand's Will, although the Debutter properties were dedicated by his sons.

The plaintiff claimed to be entitled to the shebaitship as against Mayabati,

(a) on the ground of Mayabati's surrender of her claim to the shebaitship and thereby offering herself in favour of the plaintiff who was the next in succession.

(b) On the ground that Mayabati as the then representative of the Debutter estate could renounce her shebaitship by a *bona fide* compromise not contrary to the interest of the idol and she was bound by the terms of settlement in the testamentary suit :

Held, that the arrangement by which Mayabati purported to give up her right to the shebaitship in favour of the plaintiff was a bad bargain and could not be supported upon the principles applicable to the subject.

A Shebait is incompetent to sell his religious office for his own pecuniary benefit, even if he sells to the person next in succession to the office.

Rajah Vurmah v. Ravi Vurmah (1) ; *Khetter v. Hari Das* (2) ; *Rajaram v. Ganesh* (3) and *Srimati Mallika Dasi v. Retanmani* (4) followed.

Nagendra Nath Palit v. Rabindra Nath Deb (5) and *Rajeshwar v. Gopeshwar* (6) referred to.

Nirad Mohini v. Shibadas (7) distinguished.

Mancharam v. Pranshanar (8) and *Narayana v. Rang* (9) dissonated from.

Per Rankin, C. J. : The transaction in question is in no way analogous to a valid surrender by a Hindu widow of her whole interest in the husband's estate. It is an attempt on the part of a person who has succeeded to the office of shebaitship to sell her right for her own pecuniary advantage.

Per Rankin, C. J. : A person cannot be compelled to accept the office of shebait and may be entitled to refuse to continue in it. It may well be that in such a case, the office goes to the person next in succession. But a sale of the office is a different thing and the purchaser cannot enforce it.

Held further, that the transaction could not be upheld on the ground of a *bona fide* compromise of her rights under the Will because there was no question which could fall for compromise in probate suit and which had any reference to the Deity. Whether the Will was a good Will or a bad Will the claim to represent the Deity stood untouched.

As against Ramlal's branch the plaintiff based his claim on adverse possession of the office of shebaitship by Soshibhushan and Ramsovak and by him as Ramsovak's nominee under the Will :

Held, the plaintiff was a mere stranger and he could not tack the possession of Soshibhushan and Ramsovak so as to get any right to the shebaitship of the Deity.

(1) (1876) L. R. 4 I. A. 76 (81). (2) (1890) I. L. R. 17 Calc. 557 (559).

(3) (1898) I. L. R. 23 Bom. 131. (4) (1897) I. C. W. N. 493.

(5) (1905) I. L. R. 53 Calc. 132.

(6) (1907) I. L. R. 35 Calc. 226 ; 7 C. L. J. 315.

(7) (1909) I. L. R. 36 Calc. 975. (8) (1882) I. L. R. 6 Bom. 298.

(9) (1891) I. L. R. 15 Mad. 183.

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Per Rankin, C. J. : The case is governed by Article 114 of the first schedule of the Limitation Act. What has to be shown is that if Ramsovak's representative or Panchanan's representative had brought a suit in 1927 (the date of the institution of this suit) they would have been barred from asserting their rights to be shebaita. If this is made out then under section 28 of the Limitation Act their rights would come to an end.

Held, on the evidence that the plaintiff had failed to discharge the heavy burden of proving that the possession of Soshibhawan or of Ramsovak was adverse to the other branches or that it amounted to ouster.

Per Rankin C. J. : In the case of co-ownership the possession of one co-owner is possession of them all. In order that it may be treated as an adverse possession there must be ouster or the equivalent to an ouster. It is familiar law in this Court that when one party out of several has in fact the enjoyment of the property the circumstances may be such and the exclusive enjoyment may be for so long a period as to be some evidence that his holding is adverse to the co-owners though the view taken in this Court is that the possession is not necessarily or usually deemed to be adverse from its commencement. This is a question of fact.

Corra's case (1) ; *Jagannath v. Chandni Bibi* (2) ; *Jey Narayan v. Srikantha* (3) and *Jagendra v. Rajendra* (4) followed.

Appeal by the Plaintiffs.

Suit for declaration.

The material facts were stated above.

The Advocate-General (Mr. N. N. Sircar), Messrs. S. C. Bose and S. C. Mitter for the Plaintiffs Appellants.

Messrs. S. N. Banerjee and S. Ghose for the Defendants Respondents Surendra, Giridhari and Jagannath.

Messrs. S. M. Bose and S. B. Sinha for the Defendant Respondent Mayabati Debi.

The following judgments were delivered:

Rankin C. J. : In this case the plaintiff Panchanon Banerjee brought his suit making as co-plaintiff the Deity or Thakur Sri Sri Isur Sitaram Chandra Jiu. The object of the suit is to have a declaration that the plaintiff Panchanan Banerjee is the sole shebait of the Deity in question and the main purpose of the plaintiff in seeking this declaration is explained by the fact that certain property dedicated to this Deity has been acquired by the Calcutta Improvement Trust and that an award of Rs. 84,000 has been made as compensation therefor. This money is now lying in a certain Court and the plaintiff has brought this suit to establish that he is the person who is in charge of or managing the properties of the deity and that he is entitled and solely entitled to

April, 11.

(1) (1912) A. C. 230.

(2) (1921) 26 C. W. N. 65.

(3) (1921) 26 C. W. N. 206.

(4) (1922) 26 C. W. N. 290.

collect this money. So far as the property is concerned it appears from an affidavit of assets which was filed (In the Goods of Soshi Bhusan) in 1922 that the items 1, 2 and 3 and 3/1, Balaram De Street were assessed to rates by the Corporation of Calcutta upon certain annual values—those annual values total a sum of Rs. 2,394. But beyond this reference in the affidavit of assets I am not aware that there is any real evidence as to the income that has in the past been obtained from these properties, nor is there before the Court any statement of account showing what has been done with that income during the last 20 years or so.

The endowment with which we are concerned was made by one Ram Chand Mukerjee and if we desire to know the conditions of the endowment and the order of succession to the shebaitship we have to study the Will of Ram Chand Mukerjee. It appears that the founder Ram Chand Mukerjee died so far back as 1862. He left a son Panchanon by his first wife and two sons Ramlal and Soshibhusan by his second wife. Panchanon it appears had no son. His branch is made a party to this suit by his daughter's sons of the name of Ganguli who though impleaded have taken no part in the proceedings. They were impleaded at the instance of the learned Judge and not at the instance of the defendants. Ramlal and Soshibhusan died in 1895 and 1911 respectively. Ramlal's branch is represented by his grandson Surendra and two sons Greedharee and Juggernath who are defendants to the suit and contest the plaintiff's claim to be the sole shebait of the Idol. Soshi, as I have stated, died in 1911. He had a son Kherode who predeceased him. Kherode had a son Ramsevak and a daughter Ganesjanani. Ramsevak died in 1923 leaving his widow Mayabati. Ganesjanani had married a man named Ram Kali and the plaintiff is their son.

It appears that after Ram Chand's death there was a partition suit between his sons and his secular properties were divided not on the basis that by his will absolute interest went to Ram Chand's grandsons but on the basis that his sons took an absolute interest in the property. The properties having been divided it further appears that litigation ensued between the brothers and in the end the interest of Ramlal in the property left by his father was purchased in execution by his brother Panchanon. By the will of Ramchand Mukerjee apart from his gift to his sons to which I shall refer in a moment Ram Chand left a legacy of Rs. 30,000 to be invested in company's paper or landed properties and reserved separately for the maintenance of the Deity with

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which we are concerned. The interest or rent accruing due on the Rs. 30,000 was intended by him as an endowment to the Deity. His three sons were all executors to the will and they were all responsible for the fact that this sum of Rs. 30,000 was not at first set aside but after the property had been partitioned between them in the manner to which I have referred and after Ramlal's interest therein had been purchased by Panchanon, Panchanon and Soshibhusan agreed that the properties now in question should be given over to the Idol in satisfaction of the legacy of Rs. 30,000 which had been given by their father under his will. I mention this to show that there can be no doubt that the properties with which we are concerned are governed by the terms of Ram Chand's will and that the rights of the parties as regards the management of this debattar property are to be found in the first instance by scrutiny of Ram Chand's will. Now the passage in the will is to the effect that there are certain Idols of an ancestral character and there is this Idol to which I have referred and which has been established by Ram Chand himself. The will goes on to say "Seba or service I make over to my three sons for interest" and it appears that by this he means that he makes them over to his sons for their lifetime. The will then states "after their death my sons' sons will get absolute the said real property and the seba and services of Sree Sree Ishore Jeeoos or Deities" It goes on to point out that if any of his sons die without leaving a son or adopted son or son's son then his share will be included in his "Estate" and his two surviving sons will enjoy and possess and that after their death their sons will get absolutely the shares of their respective fathers.

The first question which arises upon this direction in the will of Ram Chand is whether or not the plaintiff has to make out, apart from a claim by adverse possession, that he obtained shebait right by being an heir of Ram Chand Mukerji. In my view it is wrong to say that according to the direction of the founder no person in time to come shall be a shebait unless he is an heir of Ram Chand and it appears to me that it is consistent with the direction of Ram Chand and with the ordinary principle applicable to this matter that the plaintiff should be entitled to make out a right to be one of the shebaits of this Thakur by showing that he is an heir of Soshibhusan. In the case of *Kunjamani Dasi v. Nikunja Behari Das* (1) this question was discussed and it will suffice to refer to that case as being a reason for rejecting the con-

(1) (1915) 22 C. L. J. 404 (408).

tention that it is necessary for the plaintiff to show that he is one of the heirs of the founder himself.

Now the plaintiff's case is made out in this way. He says that at the time of Ram Chand's death Panchanon had no son, and that the right to shebaitship became vested in Ramlal and Soshibhusan. He says that Soshibhusan during his lifetime was the only person who in fact enjoyed and possessed the office of shebait and that, whatever be the reason, up to 1895 while Ramlal was alive and after Ramlal's death from 1895 to 1911, there is no evidence of Ramlal or any of his sons taking part with Soshibhusan in the management of the Debattar property. Soshibhusan in his will claimed to have a right to nominate his successor and he nominated Kherode by his will and Kherode's son Ramsevak. From 1911 to 1923 Ramsevak conducted the worship and managed the property of the Deity and during all this time there was no claim on the part of any of the sons of Ramlal or any representative of Panchanon to have an interest in the worship or in the management of the property. Then it is said that after Ramsevak's death his widow Mayabati Debi became his heir and made an arrangement with this plaintiff in the Probate suit (No. 3 of 1925) by which she gave up her claim to shebaitship in favour of Ramsevak's estate and in this way Mayabati has effaced herself and the plaintiff is entitled not only to succeed Ramsevak in his office but also to claim exclusive possession of this office.

Now there are two main questions in this case. One is whether the transaction with Mayabati is a good transaction so as to enable the plaintiff to claim as representing the line of Ramsevak and Soshibhusan and secondly if so whether the possession of the office by Soshibhusan and Ramsevak enables the plaintiff to set up a right by adverse possession.

In my opinion, the bargain between Mayabati and the administrator to the estate of Ramsevak to the effect that Mayabati would give up her right to the shebaitship is a bad bargain and cannot be upheld. The learned Judge has treated it as being an attempt to sell a religious office an attempt on the part of a person who has succeeded to the office of shebaitship to sell her right for her own pecuniary advantage. In my judgment, that is the right way on the facts of this case of treating this transaction. The learned Judge says "It was first argued that this was a good sale "for the benefit of the Deity, but that is an untenable position. Shebait cannot traffic in dedicated properties". He then dealt with various other matters and said "It was then [argued that the lady surrendered

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her right. This was said to be analogous to the surrender of her estate by a widow. But that doctrine depends on the effacement of the widow and the complete surrender of her estate and cannot, therefore, be arranged for cash. Then it was said to be a family arrangement but the entire family was not consulted and even the co-shesbaits were not consulted and therefore it was not valid as a family settlement. It was suggested that it was a compromise of a claim and not an alienation. But the sum and substance of the transaction was the sale of a religious office for money and that is entirely wrong and utterly invalid and in matters of this description it is the substance of the matter that decides its validity and it matters not what it is called and it is hopeless to try to give an open and shameless sale a mere politic name after it has been perpetrated. Now the language of the learned Judge is somewhat strong but I do not dissent from it. Ramsevak had for several years been at enmity with his wife. It appears that she had to take recourse to a Police Court to make him pay her maintenance and that he was ordered to pay her Rs. 20 a month. When he made a will he provided that she would be paid this Rs. 20 a month for her maintenance and that she would get nothing more, and that the plaintiff, his sister's son would take the estate. Mayabati entered a caveat against the will of her husband and the caveat raised the question whether the will was duly executed. On that question the Court was proceeding to give a decision and Mayabati then took the position of a person who agreed as part of the settlement that the Court should pronounce in favour of the will holding it to be a perfectly good will but stipulated as a term of her giving consent to the grant of probate of the will that she would get no less than Rs. 20,000. Now it is true that by this Rs. 20,000 she would compound the right which she would get under the will. It was also a term of the settlement that she would get Rs. 20 a month until the entire sum of Rs. 20,000 was paid to her and accordingly, the bargain was carried out. The original terms of settlement read that, "in consideration of the sum of Rs. 20,000 to be paid to the defendant Mayabati absolutely she withdraws her caveat" but that was changed subsequently and it was settled that Mayabati should "receive payment of Rs. 20,000 absolutely from the estate of Ramsevak deceased;" that Rs. 20,000 shall be a charge on certain property and that the payment of the sum of Rs. 20,000 will be in full discharge and satisfaction of all her claims against the estate of the deceased for her right of residence and maintenance as a Hindu widow and all other claims

whatsoever *including claim to the Debuttar estate*". Now in any reasonably strict sense she had no claim or pretence of claim to or against the Debuttar estate but she had the right to the office of shebait or trustee of that estate. She had lent no money to the estate or to the previous shebait as such. I will assume however that her claim to the office of shebait was intended to be politely clothed by the expression used. Also that her release of her right to the administrator under Ramsevak's will was meant to operate as a transfer or surrender of the office to the plaintiff. I ask myself "what had this lady's claim to the Debuttar estate to do with the validity or invalidity of the execution of Ramsevak's will?" The answer is "nothing whatsoever." What she was attempting to do was to make some money out of her obstruction to the grant of the probate of the will, and what the administrator the person bargaining with her has done in the matter is only too clear. He endeavoured to buy her off by obtaining her consent to abandon, relinquish or transfer all her claim to the estate. She wanted Rs. 20,000. He was willing to give her that sum if it included a bargain that she would not make any claim to "the Debuttar estate." A document was afterwards made out in the form of a release in which it was witnessed that in consideration of a sum of Rs. 20,000 she released to the administrator all her claims against the estate of the deceased Ramsevak "including her claim to the Debuttar estate." We have to make up our minds whether it is a valid arrangement under Hindu law either for the effacement of Mayabati or for transfer of her right to the shebaitship. I am of opinion that this is not an arrangement which can be supported upon principles which are applicable to the subject. If a person sells religious office it is contrary to what was laid down by the Privy Council in the well-known case of *Rajak Vurma Valia v. Ravi Vurma* (1). The doctrine on the subject has recently been considered by my learned brother Mr. Justice Page in the case of *Nagendra Nath Palit v. Rabindra Nath Deb* (2). This is a clear case of a sale by which a shebait is trafficking for gain in her own office and that is the fundamental and real character of the transaction. It is said that just as there is an anomalous doctrine by which a widow may accelerate the opening of the reversion to her husband's estate by surrendering the whole interest which is vested in her, effacing herself and assuming a character that is at times compared to civil death, so with reference to the office of a shebait if she abandoned the office or surrendered it so as to let

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(1) (1876) L. R. 4 L. A. 79 (81).

(2) (1925) I. L. R. 53 Calc. 132.

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in the next reversioner the transaction may be considered good although in the ordinary way the sale of a religious office for gain will not be valid. I am of opinion that the transaction before this Court is in no way analogous to a valid surrender by a Hindu widow of her whole interest in her husband's estate. This case to my mind is a mere device by which Mayabati was trying to get as much cash as possible from the estate. It is then said that Mayabati if she had a claim to represent Ramasvak's estate so far as the shebait is concerned might make a *bona fide* compromise not contrary to the interest of the Idol. (She was not of course in any way thinking of acting for the benefit of Idol in making up her mind to convert the office into cash). But I cannot see that there was any question which could fall for compromise in a probate suit and which had any reference to the Deity. Whether the will was a good will or a bad will the claim to represent the deity stood untouched. It was thrown into the Probate suit merely as something to bargain with because it was coveted by or on behalf of the plaintiff and it was capable of being turned into money. It is quite true that where a surrender by a Hindu widow of her whole interest is *bona fide*, as for example when it is necessary to enter into a reasonable compromise as to litigation as to her husband's estate the transaction will not be upset because of a reasonable provision for maintenance : *Sureswar v. Maheswari* (1) and there are cases which even say reasonable provision for her debts. But that is not this case. I do not think that the transaction can possibly be upheld unless we are to say that a shebait may sell his office so long as he sells to the person next in succession to the office. This proposition I refuse to accept. A person cannot be compelled to accept the office of shebait and may be entitled to refuse to continue in it. It may well be that in such a case the office goes to the person then next in succession. But a sale of the office is in my judgment a different thing and the purchaser cannot enforce it. In *Mancharam v. Pranshanhar* (2) and *Narayana v. Ranga* (3) such a sale was thought to be good but in my judgment these authorities should not be followed. In *Rajeshwar Mullick's* case (4), Maclean C. J. said "No doubt, there are cases and authorities for the proposition that a shebait may be an act *inter vivos* alienate the shebaitship; but I think I am fairly stating the result of those cases when I say that such alienations are not regarded with much favour, and that some-

(1) (1920) I. L. R. 48 Calc. 100.

(2) (1882) I. L. R. 6 Bom. 293.

(3) (1891) I. L. R. 15 Mad. 183.

(4) (1907) I. L. R. 35 Calc. 226 (229) ; 7 C. L. J. 315.

what special circumstances must exist to support them." In *Nirad Mohini v. Shibdas Pal* (1) an alienation had been made to a co-shebait and it was upheld expressly on the grounds that it was in the interest of the worship and "seems to have been made without any idea of personal gain." In *Khetter v. Hari Das* (2) Banerjee J. said. "It is true that Hindu law prohibits the sale of an Idol and also the partition of it though when there are several Idols partition is recognised by custom. But there is no absolute prohibition against the gift of an Idol." The learned Judge was himself no mean authority of the most difficult questions of Hindu law and he supported these propositions by quoting very high authority. In *Rajaram v. Ganesh* (3), Ranade J. said that "the text law admittedly prohibits both partition and alienation" and vested the validity of such transaction in custom. On this view, that there is a difference between a sale and a transaction not tainted by the motive of private benefit to the transferor is a proposition for which *Rajah Furma's* case (4) is sufficient authority.

In my judgment, the plaintiff is not entitled to stand in the shoes of Ramsevak for this purpose. He is a mere stranger to this religious office and dedicated property and on that ground alone his suit cannot succeed. It cannot succeed on any ground of adverse possession because there has not been 12 years possession since Ramsevak's death, and if the plaintiff is a mere stranger it is quite clear that he cannot tack the possession of Soshibhusan and Ramsevak so as to get any right to the shebaitship of the Deity.

I shall now proceed to deal with the question whether or not the learned Judge was wrong in refusing to hold that the plaintiff has established that the branches of Ramlal and Panchanan forfeited their rights in this shebaitship by suffering the branch of Soshibhusan to hold possession adversely for over 12 years. In my judgment the case is governed by Article 124 of the first schedule of the Limitation Act. What has to be shown is that if Ramsevak's representative or Panchanan's representative had brought a suit in 1927 they would have been barred from asserting their right to be shebait. If this is made out under article 124 then it appears to me that under section 28 of the Limitation Act their right would come to an end. The question is whether there has been a lapse of 12 years from the time when Soshibhusan or his representative took possession of the office adversely to the branch of Ramsevak or Panchanan. There is

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(1) (1909) I. L. R. 36 Calc. 975. (2) (1890) I. L. R. 17 Calc. 537 (539).

(3) (1898) I. L. R. 23 Bom. 131. (4) (1876) L. R. 4 F. A. 76 (81).

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no doubt that the branch of Soshibhusan had possessed this office for much longer than 12 years. The question is "Did they possess it adversely to the branch of Ramsevak or Panchanan?" Now the learned Judge has drawn our attention to the decision of the Privy Council in *Corra's* case (1) which was not a case about possession of an office but about possession of land and other properties and has pointed out that if a person who has title takes possession his possession will as long as possible be attributed to his title rather than attributed to a wrongful act or assertion of right which was not possessed by him.

In the case of co-ownership the law is very familiar in this Court, namely, that the possession of one co-owner is possession of them all. In order that it may be treated as adverse possession there must be ouster or the equivalent to an ouster. It is familiar law in this Court that when one party out of several has in fact the enjoyment of the property the circumstances may be such and the exclusive enjoyment may be for so long a period as to be some evidence that his holding is adverse to the co-owners though the view taken in this Court is that the possession is not necessarily or usually deemed to be adverse from its commencement. I regard this question as a question of fact and I have to see whether it is established beyond doubt by the plaintiff that the circumstance that Soshibhusan and Ramsevak were allowed to manage this property and conduct the worship of this Deity was an open assertion to the knowledge of the other branches that they were claiming a right to exclude the other branch from the shebaitship. As to that the plaintiff's case at the beginning is very unsubstantial indeed, because we find from the will of Soshibhusan that when he died in 1911 he professed to have carried out the duties of shebait by the consent of his brother Ramsevak in his lifetime, so that, it does not seem to me that the plaintiff makes any headway at all during the lifetime of Soshibhusan. Then we find that Ramsevak from the year 1911 to 1923 carried out the worship and the management of this Idol just as Soshibhusan did. We remember that the possession of this branch began by arrangement or consent. It is quite clear that Ramsevak's continuance of what has been done by Soshibhusan cannot be assumed to be adverse straightway. Soshibhusan's will was not proved till 1922. There was no effort made to show that the terms of the will were drawn to the attention of anybody or that Ramsevak openly or at all was claiming to be

(1) (1912) A. C. 230.

acting under a gift of the shebait contained in Soshibhusan's Will. There is no evidence that the branch of Ramlal or Panchanan knew or was likely to know what remarks were put upon the receipts from tenants. We have to deal with this matter broadly, and we find that there is a complete absence of any evidence of steps taken by Ramsevak which would call the attention of the members of the other branches to the fact that he was claiming that the branch of Ramsevak alone had any right to the shebaitship of the foundation of Ram Chand.

There is one important matter which remains to be considered. There is no evidence showing what the annual profit of Ramsevak was. In point of theory the shebait's duty was to spend the whole of the income on the worship of the Deity. I suppose however that if the Deity had a substantial income it is quite clear that the right to disburse that income in the worship of the Deity would be a valuable right. Now the learned Judge has dealt with this case on the footing that there was no profit and that Ramsevak was permitted by the other members of the family to carry on the worship as an "honorary shebait" just as Soshibhusan had been doing. It is difficult to be sure whether in Ramsevak's time or at any given time the income produced by this property was very substantial. I have said we know what the Corporation assessment was, and what actual value was put upon it by the Calcutta Improvement Trust but whether this property dedicated to the Deity yielded an income much more than was necessary to conduct the worship is a matter on which the evidence is scrappy and inconclusive. The learned Judge says "Presumably the shebait makes no profit out of his office and it is not suggested that Ramsevak did so." He further says "In all the circumstances, specially as there were no profits to share everything concurs to show that there was no ouster". Looking at the matter as a whole it does not seem to be of very great importance whether the Idol was removed to Soshibhusan's house or whether it was left in the Thakurbari with other family Idols. It is quite clear that Soshibhusan was the only person who conducted the worship. Ramlal had in a sense no strong claim in his lifetime because he was the person whose property had been sold to his brother Panchanan. It was really Panchanan and Soshibhusan who had to make up the legacy of Rs. 30,000. It seems to me that the other branches of the family might leave it to Soshibhusan's branch without depriving themselves of their rights under Ramchand's will. The learned Judge's judgment was very full and clear on this part of

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the case and his conclusion was that Ramsevak stepped into the shoes of his grandfather and that it was usage and course of dealing which he vouched to explain his conduct.

In these circumstances I am not prepared to dissent from the judgment of the learned Judge upon this question of fact. I do not think that a heavy burden has been discharged. The plaintiff's case was brought in 1927. If it be not clear that up to 1916 there was adverse possession then Ramlal's branch is not barred by 12 years' adverse possession. A period of 12 years' adverse possession must be proved up to the hilt and conclusively proved by the plaintiff. I am not prepared to say that from 1911 to 1916 it is shown that Ramsevak's possession was adverse.

The learned Judge after coming to the conclusion that the plaintiff had no right proceeded to dispose of the rights of other parties by declaration. Now none of the members of Panchanan's branch of the family appeared before the Judge and no one of Ramlal's branch, asked for any relief of this sort nor did Mayabati. In these circumstances I think it is unreasonable, the plaintiff having been found to have nothing to do with the matter, that the Court should insist in a difficult matter and upon materials which may be very incomplete upon defining the rights of these parties and as objection is taken by those who have appeared I am of opinion that that part of the learned Judge's judgment which gives a declaration as to the rights of these defendants should be discharged altogether."

The result is that the appeal by the plaintiff is dismissed with costs and the suit stands dismissed with costs and the declaration which the learned Judge has made is set aside.

The cross-objection is allowed but without costs.

C. C. Ghose, J.—I entirely agree. The matter has been dealt with at such length by the learned Chief Justice that it may be considered unnecessary for me to add a second judgment. But as this case has been argued for over two days with great vigour by Mr. S. C. Bose, it might not be out of place if I stated briefly my conclusions on one or two points.

The genealogy of the parties is to be found in the learned Chief Justice's judgment. In my opinion the plaintiff is clearly incompetent to maintain this suit until and unless he is in a position to satisfy the Court that there is no interest still outstanding in Mayabati as shebait of the Thakur or Idol founded by Ramchand Mukherjee. It is conceded by Mr. Bose that Mayabati would be shebait of the Thakur in question, but it is said that

having regard to the terms of settlement appearing on page 234 of the Paper Book and of the Indenture dated the 21st September 1925 on Pages 236 and 237 of the Paper Book. Mayabati has not now any interest whatsoever as shebait of the Thakur. The arrangement under which Mayabati is said to have put an end to her interest as shebait of the Thakur has been referred to by the learned Chief Justice and I agree with him in the view he has taken that the arrangement is one which cannot be sustained in a Court of law. If, therefore, it be correct in law that Mayabati has still some interest left in her as shebait of the Thakur (he the plaintiff, being unable to show that interest has been put an end to or has been extinguished in manner known to law) the plaintiff cannot maintain the present suit. It is unnecessary to multiply cases. To my mind the best exposition of the law on this point is to be found in the judgment of Mr. Justice Banerjee in the case of *Srimati Mallika Dasi v. Ratannani* (1). Mr. Justice Banerjee points out that it has been held in a uniform current of decisions both in this Court and in the High Courts of Bombay and Madras that a priestly office with emoluments attached to it is inalienable. Mr. Justice Page has referred to this decision of Mr. Justice Banerjee in one of the recent cases, *Nagendra v. Rabindra* (2) where the earlier and later authorities are collected. In my view Mayabati still remains a shebait. If she is still a shebait, then, so far as the plaintiff is concerned, he is a mere stranger and he cannot step in the shoes of Ramsevak and claim as shebait. This conclusion would be sufficient to enable the Court to dispose of the plaintiff's suit by saying that it is incompetent.

The plaintiff, however, urges that by reason of the adverse possession of Sashibhusan and Ramsevak the rights of the sons of Ram Lal, who are the contesting defendants in this suit, have been extinguished and that they have no further interest in the property and cannot claim to have possession thereof as shebaita. Sashibhusan died in 1911. There are materials on the record to show that during Sashibhusan's life-time, there was no, and could not have been any adverse possession. The circumstances show further that up to the moment of the death of Ram Lal there was no adverse possession. I am further of opinion that between the death of Ram Lal and the death of Sashibhusan there was no adverse possession as against the heirs of Ram Lal. The circumstances disclosed on the record show that. Therefore, there was no adverse possession.

(1) (1897) 1 C. W. N. 493.
(2) (1925) 1 L. R. 53 Cal. 132.

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sion up to September 1911 when Sashibhusan died. Now in order to put an end to the rights of the contesting defendants 1, 2 and 3, it would have to be shown conclusively that between September 1911 and September 1923, there had been adverse possession. Now Ramsevak died on the 15th April 1923. It is clear therefore that the full period of 12 years from the death of Sashibhusan had not expired when Ramsevak died. The evidence further does not show that after the death of Sashibhusan and during this period there was adverse possession as against the heirs of Ram Lal. There are no accounts of the Debutter estate produced before us. One does not know whether there was any income derivable from the properties which had been dedicated to the Thakur. It may be that the income derived from the rents was not such as to leave any balance after defraying the expenses of the shebait. At any rate the evidence is very scrappy and the conclusion that there was adverse possession as against the heirs of Ram Lal cannot be safely drawn. There are three cases in which the doctrine of adverse possession is referred to at very great length: *Jagannath v. Chand Bibi* (1); *Joy Narayan v. Srikantha* (2) and *Jogendra v. Rajendra* (3). Bearing in mind what was said in those cases and applying the rule laid down to the facts appearing on the present record, I am unable to say that the circumstances point to the fact that there was an open ouster or that the possession of Sashibhusan and Ramsevak of the dedicated properties was of such a character that the only inference that can be drawn therefrom is that there was an assertion of hostile title against an ouster of the sons of Ram Lal. That being so I agree with the learned Chief Justice in the conclusion he has arrived at and am of opinion that the plaintiff's appeal and suit must be dismissed with costs in both Courts. I agree with the learned Chief Justice in the order he has made as regards the cross objection.

Messrs. Dutta & Sen: Attorneys for the Plaintiffs Appellants.

Mr. J. N. Mitra: Attorney for the Defendants Surendra, Giridhari and Jagannath.

Messrs. Chaudhuri & Chaudhuri: Attorneys for the Defendant Mayabati.

Appeal dismissed.

(1) (1921) 26 C. W. N. 55

(2) (1921) 26 C. W. N. 206.

(3) (1922) 26 C. W. N. 390.

*Before Sir Lancelot Sanderson, Knight, Chief Justice and
Mr. Justice Richardson.*

JAGANNATH MOTILAL

v.

BALA PROSAD ARJUNDAS.*

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July, 23.
August, 3.

*Appeal—Order for dismissal of suit in default—Order, interlocutory or final
—Civil Procedure Code (Act V of 1908), O. 11 R. 21—Limitation Act (IX
of 1908) Sec. 5.*

The terms of Order 11 rule 21 contemplate two orders being made. First an order for the answer to the interrogatories or for the delivery or inspection of documents as the case may be within a specified time; and secondly upon the failure to comply with such an order a further order dismissing the suit. An order dismissing the suit should not be made unless the Court is satisfied that the plaintiff is endeavouring to avoid giving a fair and proper discovery.

An order was made on the 14th February 1923 ordering the plaintiff to file a further and better affidavit within 10 days from the date and in default the suit would stand dismissed. This order was not complied with but the plaintiff filed his affidavit on the 13th March, 1923. The defendant applied to the Court on the 14th May, 1923 for an order that the further and better affidavit of documents improperly filed on the 13th March, 1923 be taken off the file and that the suit be struck off. On the 14th May, 1923, the Court passed the order: "It is ordered that the further and better affidavit of documents filed by the plaintiff firm after the expiration of the time granted by the said order be taken off the file: and it is further ordered that this suit be and the same is hereby dismissed for want of prosecution". Against this last mentioned order, the plaintiff appealed on the 4th June, 1923:

Held, that the order of the 14th February, 1923, became, on the 25th February, a final order dismissing the suit. It was open to the plaintiff to appeal from that order or to make an application upon proper materials to review the judgment by way of extending the time for the filing of the affidavit.

The appeal which was filed on the 4th June and was limited to the order of the 14th May, so far as the order of the 14th February was concerned, was out of time, even if it could be considered as an appeal against the order of the 14th February.

In order that the provision of section 5 of the Limitation Act be available it would have been necessary for the plaintiff to show that he had sufficient cause for not preferring the appeal within the time specified.

Appeal by the Plaintiff.

The material facts appear from the judgment.

Mr. B. C. Ghose for the Appellant.

*Appeal from Original Order No. 89 of 1923, against the order of Mr. Justice Greaves, dated the 14th May, 1923, in Suit No. 1563 of 1921.

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Mr. S. N. Banerjee for the Respondent.

C. A. V.

The following judgments were delivered :

Sanderson, C. J. : This is an appeal by the plaintiffs from an order made by my learned brother Mr. Justice Greaves on the 14th of May 1923.

The order was "It is ordered that the further and better affidavit of documents filed by the plaintiff-firm after the expiration of the time granted by the said order be taken off the file : And it is further ordered that this suit be and the same is hereby dismissed for want of prosecution".

The facts which it is necessary for me to mention for the purpose of my judgment are as follows :—On the 2nd of August 1921 an order was made that the plaintiffs in the suit should file an affidavit of documents within ten days, such affidavit to be made by their gomasta. The affidavit was not filed within ten days, and it was not until the 3rd of January 1922, that the plaintiffs filed the affidavit sworn by the plaintiffs' gomasta. On the 8th of February 1923, the defendants made an application for a further and better affidavit of documents by the plaintiffs, and on the 14th of February the learned Judge made the following order :—"It is ordered that within ten days from the date hereof the plaintiff firm do file a further and better affidavit to be made by all their members accounting for the various letters received by them from the defendant-firm and specifically disclosing the entries in their account books showing the names of the sellers of the goods referred to in the said petition, the dates on which such goods were purchased and the prices thereof : and it is further ordered that in default of the plaintiff-firm filing such affidavit within the time aforesaid this suit do stand dismissed with costs on scale No. 2." This order was not complied with. The further and better affidavit was not filed within the time specified by the order, namely, ten days, and no affidavit of documents, made by all the members of the firm, was ever filed. But on the 13th of March 1923 a further affidavit was filed : That was sworn by Motilal—one of the members of the plaintiff firm on the 6th of March.

Certain correspondence took place, which is to be found at pages 4, 5, 6 and 7 of the Paper Book.

On the 14th of March 1923, the plaintiffs' solicitors wrote as follows.

"Please note that we have filed our clients' further affidavit

of documents". It is to be noted that that was written a day after the affidavit was filed.

Then the defendant's attorneys wrote as follows :

"Yours of yesterday received by us to-day.

"Please let us know when you have filed your clients' further affidavit of documents."

To that no answer was sent, and apparently, nothing was done by the defendants until the 24th of April when the defendant's attorneys wrote to the Registrar with reference to this matter, as follows —

After referring to the order of the 14th of February 1923, they proceeded "The plaintiff firm did not file any affidavit of documents within that time. On the 15th March last we received a letter from Messrs. Pugh & Co., the attorneys for the plaintiff firm informing that the further and better affidavit of documents has been filed to which we sent an immediate reply asking them to let us know as to when they filed the affidavit of documents to which no reply has yet been received. From your office we came to learn and subsequently we saw that the affidavit has been filed and on the back sheet of the said affidavit it is noted as follows : ' Pursuant to order of 14th February 1923 out of time no steps taken.'

"Pugh & Co.

12. 3. 23.

"Requisition given.

"G. Sanyal.

12. 3. 23.

"Out of time

No steps taken

"13-3-23".

(Then comes the final note)

"File.

"13-3-23."

That last note, as I understand was initialled by the Master.

The letter then proceeded

"We do not understand how the said affidavit can be filed on the 13th March last when the order directs that it is to be filed within 10 days from the 14th and in default the suit do stand dismissed with costs and we do not know how your office received that affidavit, as the order of the 14th of February last has been drawn up completed served on Messrs. Pugh and Co., and then filed in your office.

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"Under the circumstances we shall be much obliged if you will kindly take the affidavit off the file and place the suit in the Special List of suits".

The reply of the Registrar was as follows :

"With reference to your letter of the 24th instant asking that a further affidavit of documents filed by Messrs. Pugh & Co., on behalf of the plaintiff firm should be taken off the file as having been filed after the expiry of the time granted by the peremptory order of the 14th February last, I write to inform you that owing to the endorsement made by Messrs. Pugh and Co., that no steps have been taken and made on the 12th March and owing to the fact that the order itself was not signed until the 16th March and not filed till the 19th March, the ledger-keeper certified that the affidavit was out of time and that no steps have been taken and hence the order was given by the Master on the 13th that the affidavit be filed. The affidavit has obviously been wrongly filed but I am unable to take it off the file or to place the case in the special list of suits, unless Messrs. Pugh and Co., consent or unless you obtain an order for that purpose."

Having received that letter from the Registrar the defendants gave notice of an application on the 5th of May as follows :

"Take notice that an application will be made before the sitting Judge in Chambers on the 8th May 1923 on the part of the defendant firm abovenamed for an order that the further and better affidavit of documents improperly filed on the 13th March 1923 be taken off the file and this suit be struck out."

This matter came before the learned Judge on the 14th of May, he had before him an affidavit sworn by the gomasta of the plaintiff firm in which he set out that none of the partners of the plaintiff firm was in Calcutta but that Motilal who had sworn it in Alwar and that he had sent it down to Calcutta where it was received on the 12th March and filed on the 13th March, alleging that there had been no negligence : and, then it was further alleged that inasmuch as no steps had been taken by the defendant firm, the plaintiff firm was entitled to file the said affidavit.

The learned Judge on the 14th of May 1923 made the order, which I have already read, and this appeal has been filed against that order of the 14th of May.

It was pointed out during the course of the argument that the second order of the learned Judge, which he made at the instance of the defendants, was really a superfluous order inasmuch as the first order provided that if the affidavit were not filed within

the time specified in the order of 14th February the suit should stand dismissed with costs; and inasmuch as the affidavit was not filed within the time specified the suit was in fact dismissed; in other words that the order of the 14th of February became on the 25th of February a final order dismissing the suit.

It was argued by the learned Counsel on behalf of the plaintiffs that the order of the 14th of February was no more than an interlocutory order and that inasmuch as the plaintiffs had appealed from the final order of the 5th of May the plaintiffs were entitled to challenge the propriety of the order of the 14th of February 1923 as well as the order of the 5th May.

In my judgment that argument should not be accepted. In my opinion the order of the 14th February became on the 25th February a final order dismissing the suit. It was open to the plaintiffs to appeal from that order if they so desired and, I suppose it was also open to them to make an application upon proper materials to the learned Judge to review his judgment by way of extending the time for the filing of the affidavit. The appeal with which we are now dealing was filed on the 4th of June 1923 and was limited to the order of the 14th of May and therefore as far as the order of the 14th of February was concerned the appeal was long out of time even if it could be considered as an appeal against the order of the 14th of February.

The second point which the learned Counsel for the plaintiffs urged was that the learned Judge had no jurisdiction, to make the order of the 14th of February in the form in which it stands and that it must be regarded as an order which was made entirely without jurisdiction and therefore as a nullity.

The order was made in pursuance of the provisions of order XI rule 21 Civil Procedure Code which run as follows:—

"Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents he shall if a plaintiff be liable to have his suit dismissed for want of prosecution and if a defendant to have his defence, if any, struck out, and to be placed in the same position as if he had not defended and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect and an order may be made accordingly".

There was no appeal by plaintiffs from the order of the 14th February and in my judgment it is not necessary for the purpose of the disposal of this case to decide whether the learned Judge should have made the order of the 14th of February 1923 in the

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form in which it stands. At present I am not prepared to hold that it was made without jurisdiction. It may be that the learned Judge was satisfied on the 14th of February 1923 that the plaintiffs were endeavouring to avoid giving a fair and proper discovery of documents. I am inclined to think that he must have been of that opinion first because of the peremptory nature of the order that the affidavit of documents should be made within ten days secondly because he directed that all the members of the plaintiff firm should make an affidavit and thirdly because of the matters which he specified that the plaintiff firm should disclose. I desire to make it clear however that I do not decide the question in this case whether the learned Judge had jurisdiction to make the order of the 14th of February in the form in which it stands. At the same time I think it is desirable to add that in my judgment the terms of order XI rule 21 contemplate two orders being made. First an order for the answer to the interrogatories or for the discovery or inspection of documents as the case may be within a specified time; and secondly upon the failure to comply with such an order a further order dismissing the suit.

This is in accordance with the English practice as to which reference may be made to Daniell's Chancery Forms (Sixth Edition) P. 1027, the form being No. 1932 which order is made in pursuance of the English order XXX rule 21 which is similar to order XI rule 21 in all material respects.

It is desirable to add in my judgment that this course should ordinarily be followed and it should be noted that an order dismissing the suit should not be made unless the Court is satisfied that the plaintiff is endeavouring to avoid giving a fair and proper discovery.

It must therefore be assumed that, when the learned Judge made the second order, namely that of the 5th of May 1923 the learned Judge was satisfied that the plaintiffs by not conforming to the order which he had made on the 14th of February were endeavouring to avoid giving a fair and proper discovery. That being so, in my judgment the learned Judge had jurisdiction to dismiss the suit and having regard to the facts of the case I am not prepared to say that the learned Judge was wrong in the exercise of his discretion in dismissing the suit.

The last point which the learned Counsel for the plaintiffs urged was that this Court should exercise the jurisdiction which is given under section 5 of the Limitation Act and extend the time for appealing from the order of the 14th of February 1923. In

order that the provision of that section should be available it would be necessary for the plaintiffs to show that they had sufficient cause for not preferring the appeal within the time specified. I cannot see any grounds which would bring the case within the scope of that section. The terms of the order of the 14th February were perfectly plain and I do not find that the defendants did anything to mislead the plaintiffs. As far as the Court is concerned, it is true that the Master directed the further affidavit to be filed but it has been explained by the Registrar that would not have been done but for the endorsement which was put on the affidavit by the attorneys acting for the plaintiffs.

Consequently, in my judgment for the reasons, which I have mentioned this appeal must be dismissed with costs.

Richardson, J.—I agree.

Messrs. Pugh & Co. : Attorneys for the Appellants.

Messrs. Khaitan & Co. : Attorneys for the Respondent.

A. T. M.

Appeal dismissed.

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*Before Sir George Claus Rankin, Knight, Chief Justice, and
Mr. Justice C. C. Ghose.*

KARNANI INDUSTRIAL BANK, LTD.

v.

THE NAWAB BAHADOOR OF MURSHIDABAD.

Decree, execution of—Receiver, appointment of—Civil Procedure Code (Act V of 1908), Sec. 51—Decree against Nawab of Murshidabad.

In execution of a decree against Nawab of Murshidabad, a Receiver can be appointed of rents and profits issuing out of his immovable properties; Act XV of 1891 is no bar. The appointment of such Receiver is discretionary with the Court.

Davis v. The Duke of Marlborough (1) explained.

* Appeal from Original Order No. 49 of 1929, against the order of Mr. Justice Lord Williams, dated the 28th March, 1929.

(1) (1818) 1 Swan. 74.

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: Appeal by the Judgment-debtor.

: Application for appointment of Receiver.

The material facts appear from the judgment.

Messrs. S. N. Banerjee and A. K. Roy for the Appellant.*Messrs. N. N. Sircar (Advocate-General), B. K. Ghose and
B. K. Chowdhury* for the Respondent.

The following judgments were delivered :

Rankin C. J.: In my opinion, the appeal must be allowed.

The application is one by the Karnani Industrial Bank Limited who appear to be unsecured creditors of the respondent for a debt which was represented at one time by four decrees but which was adjusted on the 5th July 1926 at the sum of Rs. 74,293 due on the 31st May of that year. The arrangement between the parties was in writing and it is clear that, in default, the Bank was to be entitled to realise by way of execution the moneys that would be outstanding. The present question arose upon an application on behalf of the Bank for an order that a Receiver should be appointed in execution of these decrees of the rents and profits of certain properties, all of which were within the ordinary original civil jurisdiction of this Court. The form of the application is what is known in England as equitable execution. It is a form of execution recognized by the Civil Procedure Code under section 51 thereof. The contention on behalf of the respondent Nawab is that, having regard to the Murshidabad Act, the rents, issues and profits of these properties cannot be taken in execution by means of a Receiver or at all. The Act in question is Act XV of 1891 and the main function of the statute was to confirm an Agreement between the Secretary of State and the then Nawab. I do not propose here to set out the history of the matter; but in the end the position adopted under that Agreement is this that there were certain properties which did not belong to the Nawab's predecessors as of right but which belonged, in effect, to the public domain and these properties were given over upon terms of this Agreement to the successive Nawabs upon certain limitations which would ensure, in the opinion of the legislature, that these properties should always be a support sufficient to maintain the dignity and position of the Nawab Bahadur and his family. The Act and the Agreement deal with matters apart altogether from the immovable properties and I confine what I have to say to the immovable properties. It was agreed and declared that the several immovable properties in Schedules I and II and also the immovable properties in Schedule III and all other

immoveable properties thereafter mentioned "shall henceforth and for ever be held and enjoyed by the said Nawab Bahadoor and such one among his lineal heirs male as may be successively entitled to hold the said titles in perpetuity with and subject to the incidents powers limitations and conditions as to inalienability and otherwise hereinafter contained." The limitations include a limitation which prohibits the Nawab or any successor from selling, mortgaging, devising or alienating any of the properties mentioned save by lease or demise for a term not exceeding 21 years and under a rent without bonus or salamee. It was further provided that "in case the Nawab or any of his lineal heirs male shall at any time in contravention of the terms of the Agreement attempt to sell or alienate or shall by a course of extravagance or by waste or mismanagement of the said immoveable properties disable himself in the opinion of the Secretary of State from duly maintaining the dignity of the said position and station, then it shall be lawful for the Secretary of State at his discretion to enter into and upon the said immoveable properties, to take possession thereof and take the rents, issues and profits" and so forth.

Now, before the learned Judge, a good deal was made of the case of *Davis v. The Duke of Marlborough* (1) in which a similar question arose as regards the Duke of Marlborough's estate. I agree with the learned Judge that the position in the present case is distinguishable from the position with which Lord Eldon had to deal in 1818. In that case, all that appears to have happened was that the aid of the Legislature was given at the instance of the Duke to enable him to settle upon succeeding generations certain properties so that these properties would always go with the title whereas the Duke might by granting a settlement at his own hand have attempted the same result, it would have been possible in succeeding generation to bring to an end the limitations or restrictions (or some of them) which the donor had imposed. Accordingly, the aid of the Legislature was invoked and there were put stringent limitations which had reference entirely to this that the property was rendered in the hands of each successor inalienable so as in no way to defeat the claim and enjoyment of the next in succession. Accordingly, Lord Eldon, having taken that view of the Statute, had little difficulty in rejecting the contention that it was not open to him to appoint a Receiver of the rents and profits.

In this case it is quite true that the Statute makes it quite clear

(1) (1818) 1 Swan. 74.

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that these immoveable properties are given for the due maintenance and support of the rank and station of the Nawab of Murshidabad. That is the general purpose of the whole grant. The first provision is a provision in aid of that purpose. It is a provision whereby no alienation can be made of these properties except by an ordinary lease for 21 years in the ordinary course and the effect of that provision is to make it clear that no Nawab would be able to defeat the claim of his successor to the whole of the properties nor would he be in any way able to prevent his successors from having freedom of management with the not unreasonable limitation that lease without salamee or bonus for a term not exceeding 21 years would be valid as against the successors of the man who granted it. Now, in this case, it is contended by Mr. B. K. Ghose on behalf of the Nawab that, apart altogether from showing that what is asked by way of relief in this case would be in conflict with the first of the conditions which I have quoted, I shall call it shortly the condition against alienation—there is in this Act an implied or indirect prohibition against any portion of the rents, issues or profits of these properties being taken in execution. It is said that the intention of the Legislature is that the whole of that income is necessary for the maintenance and support of the dignity and station of the Nawab and that, apart from express prohibition in the clause to which I have alluded, there is an implied prohibition making it contrary to the Act and contrary to public policy that any portion of the income of these properties should be taken in execution for a decretal debt. To that proposition, I cannot assent. It appears to me that there is nothing in this Act which would prevent the Nawab from borrowing a sum of money and giving an assignment of the next month's rent of a certain house by way of consideration. I cannot see that it is laid down that he is never to have power to anticipate by a single month any portion of the rents and profits of these properties. I cannot see that it is the intention of the Act that no degree of extravagance on his part should in any way prevent the perpetual flow of this income into the Nawab's coffer; and, in my judgment, the position is one which has been very carefully reviewed. The Legislature has not attempted to put any restrictions save those which are mentioned and which are ample to secure that each Nawab as he comes into succession will have the whole use of the properties which the Legislature originally gave. As regards the course of extravagance by which a Nawab might cripple himself, anticipating the future income to

accrue in his own life-time, it appears to me that contingency is one of the things contemplated by the concluding provision—a provision which enables the Secretary of State to step in if by course of extravagance A, the Nawab of the day should disable himself from duly maintaining his dignity and position. It seems to me that in this case the reasonable remedy—and indeed the only reasonable remedy—is by the appointment of a Receiver. That certainly is discretionary. It is not business to suppose that each tenant's rent as it becomes due could be taken in attachment.

A case has been cited to us which appears to me to be of a different character from the case now before the Court—the case of *Rajinder Narain Singh v. Sundara Bibi* (1). In that case, the Privy Council approved of the appointment of a Receiver as a means of getting execution against certain properties out of which the debtor had a right to maintenance which right to maintenance was not liable to attachment by the provisions of section 60 (1) of the Code. In the present case, it does not seem to me to be right or necessary that this Court should make provision for any provision of the rents and profits to be received by the Receiver being reserved for the maintenance of the Nawab. We are dealing with a certain number of properties, with a debt of some Rs. 74000 and, in my judgment, we ought to appoint a Receiver of the rents, issues and profits of those properties by way of execution in the ordinary course. The learned Judge has said that, if the Secretary of State were to take action under the Act, the Court might be placed in a most invidious and derogatory position, if a Receiver were appointed. I do not think that the Secretary of State would be likely at his own hand to interfere with the position of a Receiver appointed by this Court; but there can be no doubt that, if the Secretary of State did take action, the receivership would for all practical purposes come immediately to an end and this Court would be bound immediately to withdraw the Receiver just as it would be bound to do if unfortunately the life of the present holder of the dignity were to come to an end.

In my judgment, this appeal must be allowed with costs in both the Courts and the Official Receiver must be appointed Receiver of the rents, issues and profits of the properties mentioned in the application. We give the Receiver the ordinary power to bring suits against tenants without special permission. He is not to

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Ramesh, C. J.

(1) (1935) L. R. 53 I. A. 262; 41 C. L. J. 383.

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interfere with possession. The receivership will come to an end the moment the money is realized.

C. C. Ghose, J :—I agree.

Dutt & Sen : Attorneys for the Appellants.

B. N. Basu & Co. : Attorneys for the Respondent.

A. T. M.

Appeal allowed.

FULL BENCH.

*Before Sir George Claus Rankin, Knight, Chief Justice,
Mr. Justice C. C. Ghose, Mr. Justice Buckland,
Mr. Justice B. B. Ghose and Mr. Justice
M. N. Mukherji.*

EMPEROR.

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September, 2.

GRISH CHUNDER KUNDU AND OTHERS.*

High Court, jurisdiction of—Commitment, quashing of—Commitment to High Court Sessions—Presidency Magistrate, duty of—Reference to High Court, when can be made by Presidency Magistrate—Criminal Procedure Code (Act V of 1898), Secs. 210, 215, 252, 273, 432, 532.

The power of reference conferred upon the Presidency Magistrate by section 432 of the Code of Criminal Procedure is confined to questions of law which the Magistrate requires to decide in order to perform his duty in disposing of the case before him; and the Magistrate should not refer to High Court questions of law unless they are matters upon which he has a duty to make up his mind.

Under Act XIII of 1865, the foundation of the jurisdiction of the High Court was the written instrument of charge (or as it is now called the order of commitment) signed by the Magistrate and delivered by him to the Clerk of the Crown. It was only after charges so made had been recorded that the accused were to be deemed to have been brought before the High Court in due course of law. After 1865 the power of the Court to quash an indictment had become power to quash the charge comprised in the written statement of charge delivered by a Justice of the Peace to the Clerk of the Crown.

The written instrument of charge has a double aspect: it is in the first place an order of the Magistrate, and in the second place the foundation of the jurisdiction of the superior Court.

* Full Bench Reference No. 1 of 1929 in Reference under section 432 of the Code of Criminal Procedure No. 1 of 1929 by T. Roxburgh Esq., Chief Presidency Magistrate, Calcutta, dated the 10th April, 1929.

The internal arrangements of the High Court are dealt with by its Rules and the Criminal Procedure Code does not decide what functions can be exercised by a single Judge or must be exercised by a Division Bench. It deals with the High Court as one and the definitions of High Court are not intended to do more than to point to the Court itself so as to distinguish it from other Courts.

The concern of the Judge of the High Court with section 215 of the Code of Criminal Procedure is that he is bound to see that he does nothing which the section prohibits.

Section 532 of the Code of Criminal Procedure is directed to the case of commitments that are bad by reason of a defect personal to the committing officer. It envisages a Magistrate purporting to exercise powers duly conferred upon him and this is a reference to section 206. The case supposed is one in which everything that has been done has been regular but the person who has committed the accused for trial is not empowered so to do. This section has no reference to a case in which a Magistrate who has general powers to commit an accused person to the High Court commits an accused over whom he has no jurisdiction or commits him for an offence which, upon a true construction of the Code, is not triable by a Court of Session or High Court. For the limited purposes of the section the Court of Session as well as the High Court has to make up its mind whether to accept a commitment or to quash a commitment. The section is a curing or remedial section and it must be strictly interpreted in the interests of accused persons. This section does not assume or imply that the High Court at a trial has no other authority to quash a commitment.

Section 273 of the Code of Criminal Procedure, which gives a special power to High Courts, has no reference to cases of illegal commitment. It is intended to provide a short and effective way by which charges which have no merits may be disposed of.

A Judge exercising the jurisdiction of the High Court under the Presidency Towns Insolvency Act being of opinion that there were grounds for thinking that certain insolvents had committed offences under section 103 of the said Act, made a complaint under section 104 thereof to the Chief Presidency Magistrate of Calcutta. The Magistrate formally committed the three accused to the High Court Sessions. The case came before Buckland, J., in the Ordinary Original Criminal Jurisdiction of the High Court. The learned Judge took the view that as on conviction for an offence under section 103 of the Presidency Towns Insolvency Act, the maximum punishment to which the accused is liable is imprisonment for a term which may extend to 2 years and as there is no provision for imposition of a fine in addition to imprisonment, it was not possible to say of the offence charged that it could not be adequately punished by the Magistrate who has power to impose 2 years' imprisonment. In this view, being of opinion that the commitment was illegal, Buckland, J., directed that the commitment be quashed and that the record, with a copy of his judgment, be returned to the Chief Presidency Magistrate in order that he might deal with the complaint according to law. When the matter went back to the Magistrate, the accused filed a petition contending that the order of Buckland, J., read as a whole amounted to a discharge of the petitioners. The Chief Presidency Magistrate, acting under section 432 of the Code of Criminal Procedure, asked the Hon'ble High Court to express its opinion, in substance, upon three questions :

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(1) Whether the learned Judge at Sessions had power to quash the commitment; (2) Whether he was right in law in quashing the commitment for the reasons given by him; and (3) Whether it is competent for the Magistrate to proceed in the absence of a fresh complaint or whether he can proceed with the case as it stood prior to his passing the order of commitment:

Held, that for the purposes of this case the Magistrate should have taken the order of Buckland, J., as an effective order quashing the commitment and proceed with the case as a warrant case under the provisions of Chapter XXI of the Code of Criminal Procedure.

That it was necessary for the Magistrate in this case to go back to the point at which he took cognizance of the complaint. The Magistrate must begin the trial afresh under section 232 of the Code of Criminal Procedure. There was no need whatever for a fresh complaint.

That it was not open to the Chief Presidency Magistrate to ignore the order of Buckland, J., and to treat it as null and void. The order of Buckland, J. was a valid and subsisting order.

Reference under section 432 of the Code of Criminal Procedure by the Chief Presidency Magistrate of Calcutta.

The material facts appear from the following Letter of Reference by the Chief Presidency Magistrate:

April, 10.

"Under section 432 of the Code of Criminal Procedure, I have the honour to request you to lay the following matter before the High Court, with a view to obtaining a decision on the questions of law raised therein.

"1. Statement of the case.

"(a) On the 19th September, 1928, Mr. Mitra, Registrar, High Court, In Insolvency, acting under an order of Mr. Justice Lort Williams, passed on the 31st August previously, filed a complaint before me against Girish Chandra Kundu and 2 others.

"(b) I issued process on the accused, and began an enquiry into the matter under chapter XVIII of the Code of Criminal Procedure. I was of opinion that the case was one which ought to be tried by the High Court, and proceeded accordingly.

"(c) After a full preliminary enquiry, I committed the accused for trial by the High Court Sessions.

"(d) On the 8th March, 1929, Mr. Justice Buckland, presiding over the last Sessions, passed the following order:—

"The order will be that the commitment be quashed. The record with a copy of this judgment will be returned to the Chief Presidency Magistrate, in order that he may deal with the complaint according to law."

"The learned Judge further remanded the accused to custody with a direction that they were to be placed before me in the

course of the day, and this was accordingly done. Under his direction also, the Clerk of the Crown addressed a letter to me, relating these facts, with a view that I might grant bail to the prisoners if I thought fit.

"(e) Accordingly when the accused were produced before me I directed them to be released on bail.

"(f) On the 4th April, on the case coming on, the accused have filed a petition to the effect that the order of the learned Judge amounts to a discharge, and that the subsequent sending of the record to me to deal with the complaint according to law is not in order.

"(g) In the circumstances, I am placed in a position of some difficulty not to say delicacy, and I am to seek the decision of the High Court on the points of law involved, in order that I may know how to proceed.

"2. Points of law involved.

"Several difficult and important points of law appear to be involved, and some at any rate require to be decided before I can know how correctly to proceed.

"They are—(i) What is the correct interpretation of section 215 of the Code of Criminal Procedure? (ii) Does it give power to the Judge presiding at the Sessions to quash a commitment made to him by a competent magistrate? (iii) Does it refer to a power of the High Court in its Revisional Jurisdiction? (iv) Does it refer to both of these powers? (v) If it gives the power referred to in (ii), what is the effect when the Judge so presiding quashes a commitment has it, as suggested by the accused in their petition, the effect of a discharge, so that the committing Magistrate has no further jurisdiction in the matter, in the absence of a fresh complaint; or can the Magistrate proceed with the case as it stood prior to his passing the order of commitment. (vi) Subsidiary to the question raised in (v) is the question whether the Judge presiding at the Sessions has power to direct what shall be the effect of his order quashing the commitment. (vii) The learned Judge in the present case has quashed the commitment on a point of law viz., that the charge in the case under section 103 of the Presidency Towns Insolvency Act is one punishable with a maximum imprisonment of 2 years, that this being not more than the maximum punishment the Magistrate could award, his order of commitment was illegal. This decision appears, it is submitted with respect, to be contrary to a decision of the Calcutta High Court in

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Empress v. Kudrutsollah (1), as well as that in a Madras case, *The Crown Prosecutor v. Bhagavathi* (2) and observations of a Full Bench in a Madras case, *Queen v. Gopal Doss* (3). It is also, it is submitted with the greatest respect, contrary to the provisions of the Criminal Procedure Code. Whatever the decision as to how the present case should proceed, the question of the power to commit it still arises. The question appears to be of the very first importance. There is, I believe, no appeal against the order of the learned Judge quashing the commitment. Is the Magistrate bound by that order, so that in due course when the matter comes on again, he must not commit the case, though with all respect, he differs from the view of the law thereby expressed, and is of opinion that he has power to commit the case. If he were to commit the case in the circumstances, there would appear to be a lack of respect shown to the High Court, though in view of the conflicting decisions, another learned Judge might take a different view of the law. The question involved appears to be of great public importance, as it is a question whether an accused has or has not a right to a trial by a jury, if the Magistrate thinks he should be so tried, in cases where the Magistrate is not of opinion that a punishment greater than the maximum he can inflict is necessary.

"In the circumstance, it seems proper that I should refer the question to the High Court for decision, as it is a point of law that has to be determined for the satisfactory disposal of the present case. The question for decision then is 'Has a Magistrate power to commit a case to Sessions for trial, even though he is not of opinion that the offence cannot be adequately punished by him. Is the question of adequate punishment the only factor to be taken into consideration when deciding whether the case is one which ought to be tried by the Court of Session or not?'

"3. The direct questions involved in the present case are (v) and (vi) above. I respectfully submit that No. (v) cannot be determined without at least discussing No. 1 (iv), and for this reason I have set them out.

"4. It is not necessary or perhaps proper for me to presume to supply my own answers to the questions involved. But as showing that I have not made the present Reference without considering carefully the questions involved, and as indicating the difficulties I have found, I submit the attached notes for such consideration

(1) (1878) I. L. R. 3 Calc. 495.

(2) (1918) I. L. R. 42 Mad. 83.

(3) (1881), I. L. R. 3 Mad. 271 (284)

as they deserve. Everything is submitted therein with the greatest respect. I have been unable to find any case reported or referred to, analogous to the present, where a commitment has been quashed by the learned Judge presiding at Sessions, where it was suggested that there was any possibility of the case proceeding before the committing Magistrate on the materials before him. I may point out the delicacy of my position in that the complainant is himself a Judge of the High Court, so that if I acted on my view that I have no further jurisdiction in the matter, he would be called upon to make a fresh complaint. He might hold a different view as to the effect of the order quashing the commitment. I have been directed to proceed according to law. If I act according to my own view of the law, I may appear to be acting contrary to the order of one learned Judge of the High Court, and may possibly come into conflict with the view of another learned Judge. I have been unable to find out clearly what the law is, and hence I am making the present Reference.

"5. The records of the case are submitted herewith."

Notes recorded by the Chief Presidency Magistrate of Calcutta in support of the Letter of Reference.

NOTE I.—Discussion of section 215 of the Code of Criminal Procedure.

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The question is what is "High Court" in section 215, Cr. P. C., what exactly is the power given, and what is the result of quashing a commitment.

In the case of *Phanindra Nath Mitra* (1), doubt was expressed if in the exercise of its Ordinary Appellate Jurisdiction the High Court could quash a commitment made to the Court for trial under its Ordinary Original Jurisdiction. In the case of *Colin Mackenzie Mackay* (2), Mr. Justice B. B. Ghose stated that section 215 refers to the Appellate or Revisional Jurisdiction of the Court, while Mr. Justice Rankin referred to the question, and stated that it was not necessary for the purpose of that case to decide the matter. He also referred to the Madras case *Emperor v. Bhagavathi* (3), important in connection with section 254, Cr. P. C., where Mr. Justice Spencer held that the application should be made on the Appellate Side. The same learned Judge referred to *R. v. Chabi* (4) where Fletcher J., adjourned the case to enable the application to be made to the Appellate Side, while in another case (*R. v. Mahadeo*

(1) (1908) I. L. R. 36 Calc. 48. (2) (1926) 30 C. W. N. 276; 43 C. L. J. 310.

(3) (1918) I. L. R. 42 Mad. 83. (4) (1919) Unreported.

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Bhufak) (1) Stephen J. quashed the commitment, stating; as the Crown does not proceed against him he is discharged, evidence against the first of several accused not having been taken by the Magistrate in his presence. In an old case, before the enactment of section 215, *The Queen v. William Jackson* (2), where a European soldier had been committed for trial by the Deputy Commissioner of Hazaribagh to the High Court for trial, an application was made to Pontifex J. sitting on the Original Side of the High Court, to have the commitment quashed on the ground that by virtue of Regulation XX of 1825 the offence was cognizable only by the Military authorities. Pontifex J. directed the application to be made to the Bench then taking criminal business on the Appellate Side, which was accordingly done.

The question is therefore one that is not clearly settled. The case of *William Jackson* (2) is interesting as it occurred in 1874, shortly after the passing of the Code of 1872 (Act X of 1872) in which a provision corresponding to present section 215 first appeared. There was no such provision in the Code of 1861. The case *Queen v. Ameer Khan* (3), is an illustration of where very wide powers were claimed by Phear J. for the Judge exercising the Ordinary Original Jurisdiction of the Court, yet in this case Pontifex J. did not claim the power to quash the commitment, though the application went to the very root of the Magistrate's jurisdiction, and had the commitment been quashed, the necessary result must have been to render all his proceedings void.

I think that the question of the meaning and effect of section 215 cannot be considered apart from its history. The period 1860 to 1877 saw great changes in the law relating to procedure, both as regards the mafussil and the Presidency Towns. In 1861 the first Code of Criminal Procedure was passed, in 1862 the Charter Act, and in 1865 the Letters Patent were issued. Act XVIII of 1862 made considerable amendments in the procedure relating to indictments, on the analogy of the English Act of 1851 (14-15 Vict. C. 100). These provisions have been largely embodied in the present law in the chapter of the Procedure Code relating to charges. Act XIII of 1865 abolished Grand Juries, and made "indictment" in Act XVIII of 1862 include "charge". By the Criminal Procedure Code, Act X of 1872, considerable amendments were made, though still no procedure was laid down for the High Courts in criminal matters. The important provisions were those relating to the trial of European British Subjects. These provisions

(1) (1912) Unreported

(2) (1874) 13 Beng. L. R. 474.

(3) (1872) 7 Beng. L. R. 240

had an important bearing in the consideration of the question of the writ of habeas corpus in *Girindra Nath Banerjee v. Birendra Nath Pal* (1), and I submit they have great bearing on the question of the interpretation of section 215. I refer to sections 86, 87 and 196, 197 in particular. The present section 215 appears first as an Explanation to section 197, which gave power to commit a non-European British subject to the High Court, if jointly charged with a European British subject, and gave the High Court jurisdiction for the first time to try such a person. Section 86 provided that High Courts were to deal with proceedings against European British subjects outside of the Presidency Towns in the manner in which they were empowered by the Act to deal with the proceedings of Magistrates outside the Presidency Towns, and not according to the law of England relating to the dealings of superior Courts of England with the proceedings of justices of the peace in England, and also that the High Court should have the same powers with respect to charges and inquiries against European British subjects as Courts of Session had with respect to inquiries and charges against other persons. It is to be noted that nothing is laid down about the proceedings of High Courts in the actual trial.

The Code therefore applied, in the case of European British subjects, though committed by mafusil Magistrates, who had to be Justices of the Peace, all the powers of Appeal, Reference and Revision contained in the Code in part VI. These provisions did not apply within the Presidency Towns, where the modified law of England was still in force.

In 1875, the High Courts Criminal Procedure Act (X of 1875) was passed, which for the first time codified the criminal procedure of the High Court, and repealed Acts XVIII of 1862 (with some exceptions) and Act XIII of 1865.

Act IV of 1877 (The Presidency Magistrates' Act) enacted substantially the provisions of the Code of 1872 for Presidency Magistrates' Courts, with necessary variations. Finally, the Criminal Procedure Code of 1862 amended and consolidated into one Act, the Code of 1872, the High Courts Act of 1875 and the Presidency Magistrates Act of 1877, and section 215 in its present form (approximately) first appeared. There is no provision corresponding to section 215 in the Presidency Magistrates Act (IV of 1877).

I think the difficulties in connection with section 215 have arisen from the change from "indictment" to "charge" and then from "charge" to "commitment". Under English law the founda-

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(1) (1927) 31 C. W. N. 595.

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tion of the jurisdiction of the trial Court was the indictment. When Act XIII of 1865 abolished Grand Juries, the "charge" became the foundation of the jurisdiction. Under English Law there was certainly a power to quash the indictment. But there could be an indictment (theoretically) without any previous enquiry by a Magistrate. The effect of quashing was that a fresh indictment might be brought if the Grand Jury could be induced to bring a fresh true bill. The procedure in the High Court, and the differences from English procedure, can be well seen in the case *Queen v. Thompson* (1), where Thompson, a British subject, was tried for an offence committed on the High Seas. Sir Barnes Peacock remarks.

"The only defect in the charge is that it does not appear on the face of it to have been delivered to the Clerk of the Crown by a Justice of the Peace. But we are not sitting here as a Court of Error, in which we could know nothing, but what appeared on the face of the record. We are sitting as a Court which has all the proceedings before it, and therefore, although, we do not see on the face of the record that the charge has been preferred by a Justice of the Peace, we know that it was so, and the Judge presiding at the trial *would not have quashed the charge* for the defect now relied upon, but would have caused it to be amended. Under these circumstances, although I think it ought to appear on the face of the charge that it was delivered to the Clerk of the Crown by a Justice of the Peace or Magistrate, still I think the defect of its not so appearing is a mere formal defect, to which objection could only have been taken, under section 41 of Act XVIII of 1862, before the Jury was sworn, and that it is not a ground for arrest of judgment. Section 41 speaks of an 'indictment', but section 7 of Act XIII of 1865 says, that in Act XVIII of 1862, the word 'indictment' shall be understood to include the word 'charge', and all the provisions of the said Act shall apply to charges recorded as aforesaid and the trial of such charges."

The rest of the judgment and that of Phear J. in the same case may be read as illustrating the difficulties, arising out of the change of procedure. This is a case of 1867.

Similarly, Act XIII of 1865 is discussed at some length on a similar point in the *Queen v. Nabadwip Goswami* (2). Sir Barnes Peacock again refers to power to "quash the charge".

"He might have applied to the Court to quash the charge, bringing to the notice of the Court the facts upon which he con-

(1) (1867) 1 Beng. L. R. 1.

(2) (1868) 1 Beng. L. R. 15.

tended that the officer had no jurisdiction to prefer it ; or he might have pleaded to the jurisdiction of the Court showing that Mr. Ryland had no jurisdiction to prefer it, or, if it appeared on the face of the charge and the caption that Mr. Ryland had no jurisdiction to prefer it, might possibly have demurred. It has been held that objections to the jurisdiction may be taken by demurrer, if the objection appears on the face of the indictment, and caption, and that the want of jurisdiction may also be pleaded specially, if the defect does not appear on the face of the 'indictment'. On page 34 and page 35 the learned Judge again refers to 'quashing the indictment', and 'quashing the charge'."

The case of *Queen v. Jackson* (1), which was after the passing of the Code of 1872, similarly discusses the point, though here the reference is to "commitment". Reference is made to section 33 of the Code, which corresponds to section 532 of the present Code, and provides for a writ to a commitment, where the Court is not competent. The argument of the learned Standing Counsel may be referred to and the remark interposed by Markby J. "When do you say that Criminal Proceedings begin now that the Grand Jury has been abolished? And the answer When the Magistrate's charge has been converted into an indictment and laid before the Court. But even if the framing of the charge by the Magistrate be the commencement of criminal proceedings, the present case is not affected. Reference is also made to quashing in the remark whether, having regard to section 33 of the Code of Criminal Procedure, a commitment can be quashed at the request of the Crown."

In a note to section 198, Cr. P. C., on page 172 of the fifth edition of Prinsep's Code of Criminal Procedure, published in 1875, I find a reference to a quashing of a commitment by Markby J. in the case *Reg. v. Tutoorum Shaha*, Aug. 7, 1866, on the ground that a written instrument of charge had not been delivered by the Magistrate to the Clerk of the Crown.

Section 41 of Act XVIII of 1862, already referred to, provides for a demurrer or motion to quash for formal defect. Section 8 of Act III of 1865 gave power to a Judge of the High Court at any time before the accused was arraigned to make an entry, if he considered the charge to be clearly unsustainable. There was also provision for a *nolle prosequi* by the Advocate-General. These provisions are still retained in the present Code. The provisions as to amendment of charges, etc., now in force appear to be descendants of the provisions of the old Acts as to indictments. As to commit-

(1) (1874) 23 Beng. L. R. 474.

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ments, I may, however, quote a remark in Prinsep's annotated Code, as showing the difficulty then felt in the matter. It appears in the note to section 197 of the Code of 1872.

"Except in the cases provided for by the explanation to section 197 (i. e., now section 215) and by section 33 (now section 532), a commitment once made must result in the conviction or acquittal of the accused. The withdrawal of the charge by the public prosecutor with the consent of the Court would operate as an acquittal. See section 61 ante. *It is however by no means clear what constitutes the making of a commitment.* From section 198 the commitment would seem to be made when the Magistrate makes a written instrument under his hand and seal, declaring with what offence the accused person is charged, and directs him to be tried by such Court on such charge, but section 446 provides for a commitment made without any charge at all."

This is interesting as an early commentator's note on the section containing the earliest version of the terms of present section 415, Cr. P. C.

In none of these cases is there any question of quashing on the ground of irregularity in the proceedings before the committing Court. The only questions are as to its jurisdiction, or as to the charge. The case of *Queen v. Jackson* (1), related to the jurisdiction of the Magistrate, and appears to be one coming under section 33 of the Code (now section 532). If the committing Magistrate has no jurisdiction, presumably his Court is not a competent Court, and subject to the provisions of section 33 (i. e., 532) the Court to which the case is committed, whether a Court of Session, or High Court has power to quash. These sections (section 33 or section 532) have in fact softened the provisions of the older law, and allow a commitment by an incompetent Court to be accepted in some circumstances. In a similar way the provisions for amendment of charges, etc., softened the rigidity of the old law, while additional powers were given to the High Court, e. g., where the charge was clearly unsustainable. Although the case *Queen v. Jackson* (1) related to the jurisdiction of the Magistrate, nevertheless the Judge presiding at the Sessions, did not see fit to decide the matter, but referred the application to the Appellate Side.

We are now in a position to discuss what was the intention of the framers of the explanation to section 197 of the Code of 1872. It appears to me that it is to be read in connection with section 86, and the powers of revision given in the Code. As regards the

(1) (1874) 13 Beng. L. R. 474.

Mafussil Courts, subordinate to the Saddar Court in earlier times, English Law had not been in force. As regards proceeding against Europeans in the Mafussil, English law had been in force, and created many practical difficulties. The Code of 1872 was a further attempt to get rid of the English Procedure, which had begun in the Acts of 1862 and 1865. It extended Indian procedure to Europeans in the mafussil, in all except the actual trial before the High Court. Section 86 refers to inquiries and charges, but does not mention trials. Similarly, section 82 abolished the old writs of habeas corpus, etc., outside the Presidency Towns. Mr. Justice Rankin in the case *Girindra Nath Banerjee v. Birendra Nath Pal* (1), has pointed out the importance of the Acts of 1872 and 1875 in considering the question of the writ of habeas corpus. I submit that they are also of importance in regard to section 215. I would add that the Presidency Magistrate's Act (IV of 1877) has also to be taken into consideration.

English procedure was little concerned with what may be called commitment proceedings. If anything was to be done in regard to them it was by means of the old writs, but an indictment could be brought (theoretically at any rate) without any preliminary enquiry. Indian procedure was based on elaborate supervision of the subordinate courts (Vide Sir James Fitz James Stephen's History of the Criminal Law of England, in particular Vol. III, Chapter XXXIII, where he discusses the Indian Procedure. As he was mainly responsible for the Code of 1872, his discussion of the subject is of interest). Section 86 of the Code of 1872 applied the Indian procedure, i. e., all the provisions in the chapter of reference and revision of that Code to the proceedings of Magistrates against European British subjects, and gave the High Court the same powers with regard to inquiries and charges and Courts of Session had in proceedings against other persons. Hence the Code provided powers to the High Court to deal in revision under Indian Procedure with the proceedings of Magistrates against European British subjects. Those powers of revision obviously included a power to quash a commitment made by a competent Court, if there was anything wrong in law in those proceedings. The explanation to section 197, which now appears as section 215, Cr. P. C., appears to be no more than a reminder that this is now the effect of section 86 taken with the provisions as to revision in the Code, in regard to proceedings against European British subjects. Then as a sort of supplementary reminder, a note is added that the

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(1) (1927) 31 C. W. N. 593.

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explanation also applies to section 196. It appears therefore to refer purely to a revisional power, with reference to proceedings before a Magistrate otherwise competent.

The Code of 1872 contains no provisions as to trials before the High Court. Such power as the High Court as a trial Court had to quash a charge was affected by the fact that section 33 applied to European British subjects committed for trial by it, and by the fact that section 85 made the provisions as to charges applicable. The second paragraph of section 86 gave the High Court the same power to order further enquiry as was given to the Court of Session in section 296.

It is to be noted that the definition of "High Court" in the Code of 1872 is the one which includes the "highest Court of Criminal appeal or revision in any province." There is only one definition in that Code, not two as at present.

The next stage in codification was the enactment of the High Courts Criminal Procedure Act of 1875, which laid down the provisions as to trials in the High Court, or similar lines to those existing at present. All the provisions as to "charges" were included therein, so that these were now made applicable not only to the European British subjects committed from the Mafussil, but to all persons committed from inside the Presidency Towns. As regards the proceedings of Magistrates in commitment in the Presidency Towns, the old procedure still held good. No power of revision was given to the High Courts in Act X of 1875. Section 147 provided for the transfer of any particular case from any criminal Court within the local limits of its Ordinary Criminal Jurisdiction, a provision somewhat analogous to present section 526. If the power to quash referred to in the explanation to section 197 of Act X of 1872 had been a power of the High Court in its Original Criminal Jurisdiction, we should have, I think, expected it to appear in Act X of 1875. If it refers to the revisional power, we should not expect it to appear, because that Act conferred no powers of revision, beyond the limited powers of section 147, in respect of the proceedings of Magistrates in the Presidency Towns.

The Presidency Magistrates Act (IV of 1877) carried the codification a stage further, enacted the provisions of the Code of 1872 for Presidency Magistrates, with modifications to suit their special circumstances and powers. It gave powers in Appeal to the High Courts over the Presidency Magistrate Courts, but no powers of revision. The Act has a Chapter almost identical

with Chapter XV of the Code of 1872 as to the procedure in enquiries before Magistrates in cases triable by the High Court, but there is nothing corresponding to the explanation to section 197. This seems strong proof that that explanation refers to revisional powers.

Finally, the last stage in codification was reached in the Criminal Procedure Code of 1882, which gave revisional powers to the High Court in regard to proceedings before Presidency Magistrates, as it already had in the case of other Magistrates. The explanation to section 197 becomes a separate section, i. e., section 215, and is of universal application. It is again to be noted that though there are two definitions of High Court in the Code, one 4 (f) and one in section 266, it is the former which is applicable to Chapter XVIII. This is the definition which includes High Courts which are merely "the highest Court of Criminal appeal or revision for any local area." As regards the whole of Chapter XVIII except section 215 "High Court" can only refer to High Courts which have power to try cases, and this introduces an element of doubt into the question of the effect of section 215. In section 266 which gives the definition of "High Court" for the purposes of trials, an exception is made of sections 307 and 276, Criminal Procedure Code. The latter section relates to reference, and cannot be concerned with the question of trial and is properly excepted. As showing the difficulties of the framers, it may be pointed out that originally section 276 was not excepted. There was an amendment by Act X of 1886 to exclude this section. This section concerns the method of choosing jurors by lot both in Courts of Sessions and in High Courts "in such manner as the High Court may from time to time, by rule, direct." It is proper therefore to make an exception of this section, so as to allow High Courts, which are merely the highest Courts of criminal appeal or revision, power to make rules for the Courts subordinate to them. In 1898, when the Code was again revised, the difficulty in regard to chapter XVIII was evidently felt, and the definition in section 266 was made to apply to chapter XVIII. Section 215 was not excepted, so that as it stands section 215, Criminal Procedure Code has no application to a High Court which is merely the highest Court of criminal appeal or revision for any local area, and the power to quash is apparently given only to High Courts which have power to try cases. As further illustrating the difficulties, we may note that there was an obvious omission in section 266 in the Code

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of 1898, which was remedied in 1923, by the addition of the words "and chapter XVIII" at the end of the section. Without these words the definition was made to apply to High Courts which were notified as such for the purpose of chapter XXI, but gave no power to notify for the purposes of chapter XVIII. Again as still further illustrating the difficulties, an apparent flaw in the amendment made in 1923 to section 276 may be noted. In the Code of 1898 we had the provision :—

"thirdly, in the presidency towns—etc., etc." The mention of presidency-towns, was at once an exception to the generality of "High Court" which in this section by virtue of the exception in section 266 was made to mean High Court as defined in section 4 (f). In 1923, this appears to have been lost sight of, and we have the provision :—

"thirdly, in a trial before any High Court in the town which is the usual sitting place of such High Court." The exception provided by the words "in the presidency towns" has disappeared, and High Court here includes a High Court which has no power to try, although the provision relates solely to High Courts having such power. There can scarcely, in the circumstances, be any confusion in interpretation, but this can hardly be called clear drafting. An exception to the exception in section 266 is necessary to clear the matter.

The importance of this discussion, which is a slight divergence from the main question, is that in my opinion a similar omission was made in 1888, and still exists, and that there should be an exception of section 215 in the definition in section 266. As it stands the section apparently deliberately excludes High Courts which have merely appellate and revisional powers, and would suggest that commitment by competent Courts to Courts of Session subordinate to them cannot be quashed at all.

In conclusion I may quote again the remarks of Mr. Justice Rankin in the case of *Coll in Mackenzie Mackay* (1).

"I will assume—though I am far from asserting—that a commitment made by a Magistrate clothed under section 206 with a general or formal jurisdiction to make commitments, if made in respect of an offence alleged to have been committed within his jurisdiction and to a Court by which such offence is triable, cannot be quashed by the Sessions Judge. I will assume further—though, again, I do not assert—that in such a case no plea to the

(1) (1926) 43 C. L. J. 310 (319-20).

jurisdiction can be made by the accused in respect of any illegality in the previous proceedings."

If I may respectfully submit my own opinion in the matter, I would say that questions of jurisdiction are governed by section 532, Criminal Procedure Code. The section specifically states that if an objection to the jurisdiction of the Magistrate has been made by the prosecution or the accused (and the objection is upheld by the Judge), the commitment cannot be accepted. If no objection has been so made, the commitment can be accepted if the Judge considers the accused has not been injured thereby. If the Magistrate has no jurisdiction, he has no "powers duly conferred," though if he acts as if he had jurisdiction he purports to exercise such powers. In such a case the Court of Session equally with the High Court has power to quash the commitment. Similarly, if the Court to which the case is committed has no jurisdiction, it cannot try the case, and must refuse to proceed, whether you call this quashing the commitment, or describe it by some other words. This appears to be what may be called the residue of the old power to quash, either on a motion or by demurrer, or a plea to the jurisdiction. And even here a cure has been provided in certain cases. The old power to quash on technicalities was long ago taken away by the Acts of 1862 and 1865, the provisions of which were incorporated in the Acts of 1872, 1875 and 1877. The power to quash on the ground of irregularity in the commitment proceedings was a new power given by virtue of the revisional powers introduced successively, for the Mafussil, for Europeans in the Mafussil, and lastly for the Presidency Towns, by those acts and the Code of 1882.

The explanation to section 197 of the Code of 1872 is a reminder that such powers have been introduced, and of the way in which they can be exercised, in respect of European British subjects. Section 215, Criminal Procedure Code., in the Code of 1882 is a reminder that they have been introduced universally.

The test as to whether a case comes under section 532, Criminal Procedure Code., or section 215, Criminal Procedure Code., would appear to be whether the proceedings prior to commitment are null and void or not. If they are, i.e., if they were without jurisdiction, there appears to be no reason why both the Judges presiding at Sessions in the High Court or a Court of Session in the mafussil, should not quash the commitment. If the proceedings are not null and void, and the question relates to some irregularity

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or illegality therein, e.g., not permitting cross-examination etc., the matter is one to be dealt with by the High Court under its revisional powers. Practically, this will be advantageous, for, it is, I think clear that the Judge presiding at Sessions has no power to direct the Magistrate how to proceed, if he quashes the commitment, everything previously done is rendered null and void, and the whole enquiry must start afresh. The wide revisional powers given to the High Court, permit any suitable order to be passed to cure the irregularity, e.g., the case may be sent back for further enquiry, for permitting cross-examination etc., etc. Moreover in revision the explanation of the Magistrate can be taken, and what may appear to have been an irregularity on the record, may turn out to have been perfectly correct.

I would therefore with all respect answer the questions raised in my letter of reference thus :—

(i) Section 215, Criminal Procedure Code, refers to the revisional powers of the High Court. It would be advantageous if the wording which was perhaps suitable to an explanation, but is now rather obscure, were amended so as to make this clear. Section 266 would have to be amended so as to exclude section 215.

(ii) Section 215 gives no power to the Judge presiding at Sessions to quash a commitment. The Judge has powers to quash a commitment which are governed by the provisions of section 532, Criminal Procedure Code. The word "competent" in section 215, Criminal Procedure Code, is to be taken as including the question of the jurisdiction of the Magistrate. If he has not jurisdiction though he has otherwise power to commit, the case comes under section 532, Criminal Procedure Code.

(iii) Section 215 refers to the powers of the High Court in its Revisional Jurisdiction.

(iv) It does not refer to both powers, i.e., Original and Appellate.

(v) If the Judge presiding at Sessions quashes a commitment, the effect is to render null all previous proceedings.

(vi) The Judge, presiding at Sessions, has no power to direct what shall be the effect of his order quashing the commitment. The effect is automatically to render null the previous proceedings.

(vii) (Vide separate note). A Magistrate has power to commit for trial any case triable by the High Court (or Court of Sessions) if he is of opinion that it ought to be so tried, even if he thinks that he could inflict adequate punishment in the event of conviction.

tion. The nature, importance of the case, intricacy of the points of law involved, and similar matters may all be taken into consideration, as well as the question of punishment, in deciding the question of whether to commit or not. If he cannot adequately punish the offence, in his opinion, he must commit; if he can, he may or may not commit having regard to the other circumstances. Opinions as to the "adequate punishment" may differ widely after all, it may often be easier to say that a case is one which ought to be tried by the higher Court, than to say that the punishment must be necessarily over 2 years' imprisonment.

On perusing the note two remarks occur which have been omitted.

1. If section 215 refers to an Original Side power to quash it is not even correct, for by virtue of section 273 the Judge presiding at Sessions may, if he finds that the charge is unsustainable, make an entry to that effect. This will have the effect of staying the proceedings upon the charge. This appears to be only another way of saying that the Judge has power to quash the commitment on fact.

2. Section 215, Criminal Procedure Code, is ordinarily invoked when the question of commitment to the Court of Session comes before a High Court in revision. In High Courts such as the Allahabad High Court, which have only Original Criminal Jurisdiction in respect of European British subjects, such cases being rare, the question as to whether section 215 refers to an Original Side power has in practice probably never arisen.

NOTE II.—Discussion of the question whether a Magistrate is or is not bound to try a case in which he can inflict "adequate punishment," sections 207, 254, 347, Cr. P. Code.—

(a) With reference to the following rulings:—

1. *In re Chinnimarigadu* (1).
2. *Empress v. Kudrutoollah* (2).
3. *Queen-Empress v. Kayemullah Mandal & others* (3).
4. *Emperor v. Dharam Singh* (4).
5. *Emperor v. Bindheswari Goshain* (5).
6. *Crown Prosecutor v. Bhagavati* (6).
7. *Emperor v. Monmocha Nath Mittra* (7).

The commitment in this case has been quashed on the ground

(1) (1876) I. L. R. 3 Mad. 289.

(3) (1897) I. L. R. 24 Calc. 429.

(5) (1919) I. L. R. 41 All 454.

(7) (1926) 31 C. W. N. 144.

(2) (1878) I. L. R. 3 Calc. 495.

(4) (1906) 3 Cr. L. J. 94.

(6) (1919) I. L. R. 42 Mad. 83.

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that it was clearly illegal. With all respect, the ground on which the commitment was quashed appear to be based on an incorrect reading of the clear provisions of the Criminal Procedure Code and have the effect of directly reversing those provisions in what appears to be a very important point. The ground is that owing to the provisions of section 254 of the Criminal Procedure Code, it is illegal for a Magistrate to commit any case to the Court of Sessions, or High Court, which he is competent to try, and which he thinks he can adequately punish. This view was apparently first propounded in the case *Queen-Empress v. Kayemullah Mandal and others* (1). That case arose, curiously enough, out of a mistake by a Magistrate in reading a circular of the High Court. The Magistrate drew up a charge against the accused under section 147 of the Penal Code for trial before himself. Then later he drew up another charge against the accused for the same offence and committed them for trial to the Court of Sessions, his reason being based on a misreading of a circular. The learned Judges pointed out that the commitment of a case under section 147, Indian Penal Code, to the Court of Sessions was not necessarily illegal in view of the provisions of section 28 and 207, Criminal Procedure Code, but held that section 254, Criminal Procedure Code, limited the Magistrate's power of a commitment. They say, as I think, with all respect, wrongly. "In a summons case he is bound to proceed under section 245 of the Criminal Procedure Code. In a warrant case, he is bound by the provisions of section 254".

In the present case the learned Judge has adopted the same reasoning and has stated that the case is a warrant case, that "section 254 of the Code of Criminal Procedure provides that if the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under Chapter XXI, the Chapter prescribing the procedure in warrant cases, which he is competent to try, and which in his opinion could be adequately punished by him, he shall frame a charge against the accused. There is no question as to the Magistrate's competency to try this case nor can any question arise as to whether he can adequately punish the prisoners for the offences with which they are charged, etc."

In *Kayemullah Mandal's* case (1) the learned Judges pointed out that had the Magistrate thought that it was necessary to impose a fine of more than Rs. 1,000, then he could have committed the

(1) (1897) 1. L. R. 24 Calc. 429.

case, but as he had not so considered it, he was not competent to commit.

In both cases emphasis has been laid on the word "shall" in the phrase "shall frame a charge" in section 254. According to this view there is a limit laid on the Magistrate's power of commitment, and it affirms that section 254, Criminal Procedure Code, limits section 207, Criminal Procedure Code. With all respect, this does not appear to be a correct view. The scheme of the Code and the provisions of section 207, Criminal Procedure Code, and section 347, Criminal Procedure Code, appear clearly to show that a Magistrate may commit any case which he thinks ought to be tried by the Court of Session, and in considering the point as to whether he should commit or not, he is entitled to take into consideration both the question of the nature of the case, and the issue involved, as well as the correct punishment.

The view at present propounded is clearly supported in the case of *Crown Prosecutor v. Bhagavali* (1), where it was held that the terms of section 347, Criminal Procedure Code, are general and give a Magistrate who is empowered to commit a discretion in committing cases for trial which is not limited by section 254 so as to make it obligatory on him to try every cases which he can adequately punish. The judgment in *Kayemullah's case* (2), as well as that in *Emperor v. Dharam Singh* (3) referred to by Mr. Justice Buckland in the present matter, were referred to and dissented from emphatically. Mr. J. Sadasiva Ayyar remarks :—

"If he considers, for instance, that a complicated question of law arises or that some connected matter is already before the Court of Session or that the facts are such that trial with the aid of a jury or with the aid of assessors (who may be chosen from experts in the particular matters involved in the case) would be a more satisfactory procedure. I see nothing in section 347 to prevent the Magistrate from committing the case to a Court of Session. Section 347 does not say that the Magistrate is bound to put his reasons on record for entertaining the opinion that the case is one which ought to be tried by the Court of Sessions or the High Court.

He then refers to *Emperor v. Kudruteallah* (4) where it was held that section 221 of the Code of 1872 (corresponding to section 347 now) was a proviso to section 220 (corresponding to sec-

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(2) (1897) I. L. R. 24 Calc. 429.

(3) (1906) 3 Cr. L. J. 94.

(4) 1878) I. L. R. 3 Calc. 495.

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tion 258 now), and the learned Judges refused to quash a commitment in a case under section 147, Indian Penal Code, where the Magistrate had framed a charge, then cancelled it, and then committed the case, i.e., a case exactly analogous to *Kayemullah's* case (1).

He also refers to the remarks of the Full Bench of the Madras High Court *in re : Chinimarigaddu* (2). "The majority of the Court are, further, of the opinion—that it was quite competent for the Magistrate, to whom the case was referred, to say that either from the gravity of the matter or for any other sufficient reason, the Sessions Court was the proper tribunal for the disposal of the case, and to make order in accordance with that opinion."

Mr. Justice Napier *in Bhagavati's* case (3) was even more emphatic. He remarks :—

"This is somewhat startling proposition because as my learned brother has pointed out, it is frequent practice of Magistrates in this country to commit cases for trial to the Court of Session for other reasons, namely, convenience, complexity of facts or other matter. The Crown Prosecutor would have us hold that the whole of this procedure is wrong. Now the whole of this argument hinges on the word 'shall' which is to be found in section 254. The Crown Prosecutor argues that the section requires that he shall frame in writing a charge against the accused, and carried with it a further requirement that having done so he shall proceed under the remaining sections of that chapter. I should have some difficulty in appreciating this argument were it not that it has found favour with a bench of the High Court of Calcutta in a case reported in *Queen-Empress v. Kayemullah Mandal* (1). But with deference to the learned Judges, it seems to me that in that decision they ignore the very wide powers given by the Code to Magistrate under sections 207 and 347."

The attention of the learned Judge in the present case was unfortunately not drawn to *Bhagavati's* case, although he refers to another case of 1919, viz., *Emperor v. Bindheswari Goshain* (4) a judgment by a single Judge of the Court, where the parties were unrepresented. This case referred to and followed *Kayemullah Mandal's* case and *Jagmohan's* case (5).

It may be noted that *Bhagavati's* case (3) related to a commitment by a Presidency Magistrate under section 304A, punishable

(1) (1897) I. L. R. 24 Calc. 429.

(3) (1919) I. L. R. 43 Mad. 83.

(2) (1876) I. L. R. 3 Mad. 289.

(4) (1919) I. L. R. 41 All. 454.

(5) (1897) I. L. R. 24 Calc. 429.

with 2 years' R. I. or fine. It may also be noted that a Presidency Magistrate is not required to give reasons for commitment. It is submitted too that the remarks of Mr. Justice Sadasiva Ayyar in *Bhagwati's* case (1) are not quite accurate in their general application, for if a mufassil Magistrate decides under section 347 to commit, he must proceed under Chapter XVIII and hence under section 213 must give his reasons.

As regards the case *Emperor v. Dharam Singh* (2) referred to in the present matter, Mr. Justice Knox refers to the fact that the case committed was a summons case, that Chap. XX lays down the procedure for such and that there is no provision therein for framing a charge or committing him to the Court of Sessions. The learned Judge appears to have overlooked the instance where there is provision for unlimited fine in a summons case, e.g. section 291, Indian Penal Code, and numerous cases in outside Acts e. g., Companies, Act etc., where there is provision for fine only, or daily fine, which may be very large, (I recently fined 4 accused in all Rs. 4,000 in a summons case), where the appropriate fine may exceed the Magistrate's limit. The argument thus leads to an *en impasse*. It is evident that summons cases can be committed, and that sections 207 and 347 both provide for such. The argument really shows the fallacy of the argument which makes section 254 override sections 207 and 347.

Further it may be pointed out that the rulings in *In re Chinnai marigadu* (3) and *Emperor v. Kudrutullah* (4) referred to in *Bhagwati's* case (1) are important historically as they were made not long after the Criminal Procedure Code of 1872 came into force, and it is in that Code the words "adequately punish" first appear, they were not in the Code of 1861. It is not till 20 years later that the contrary interpretation begins to be heard of. There is a Bombay ruling on the point, but this does not support the view of *Kayamullah's* case (5) it makes comments on Magistrates unnecessarily committing cases, without asserting it to be illegal. In *Emperor v. Salamatullah Khan and others* (6), the learned Judge refused to quash commitment although the cases were triable by the Magistrate.

I may refer also to the remarks of Mr. Justice Rankin, in the case *King-Emperor v. Monmotha Nath Mittra* (7), at page 147, at the bottom of the left column, in which he declined to set aside a

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(3) (1876) I. L. R. 3 Mad. 289.

(5) (1897) I. L. R. 24 Calc. 429.

(7) (1926) 31 C. W. N. 144.

(2) (1906) 3 Cr. L. J. 94.

(4) (1878) I. L. R. 3 Calc. 495.

(6) [1900] All. W. N. 206.]

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commitment, where a charge under section 302, I. P. Code, had been withdrawn and charges under section 147/323/325/326, I. P. C., only were left.

"The fact that graver charges have been withdrawn is no reason at all why the commitment order should be set aside and the accused's right to a trial by jury should be taken away from them without their consent. In my judgment it would be wholly wrong to do anything of that sort."

Though the case is not on all fours with the present, the principle that in some circumstances an accused has a right to trial by a jury, apart from the question of punishment, appears to be recognised.

I have been unable to trace any other cases bearing on the point. *Kayemullah's case* (1) is at the root of the view that section 254, Cr. P. Code, overrules section 207 (although that case strictly relates to a matter under section 347), and I submit that it is contrary to the provisions of the Code.

NOTE III.—Discussion of the question whether a Magistrate is or is not bound to try a case in which he can inflict "adequate punishment," sections 207, 254, 347, Cr. P. Code.

(b) With reference to other provisions of the Code of Criminal Procedure, 1923.

In view of the authority quoted, it is scarcely necessary to say more, the following observations are a result of an analysis of the provisions of the present Code, in their bearing on the point, and may have some interest.

The view may be put simply that section 254 of the Code of Criminal Procedure does not limit the Magistrate's power of commitment as ruled in the cases quoted, but limits merely his power of trial.

Under section 28 of the Code any offence may be tried either by the High Court, or by the Court of Session or by any other Court by which such offence is shown in the eighth column of the second schedule to be triable. This is "subject to the other provisions" of the Code. As the learned Judges laid some emphasis on this provision in *Kayemullah's case* (1) and deduced that section 254 was such another provision, it may be pointed out that there are still several provisions of the Code, other than section 254, Cr. P. Code, which limit the power of trial, e. g., the provisions of Chap. XXIII relating to the trial of cases in which European and Indian British

(1) (1897) L. L. R. 24 Calc. 429.

subjects are concerned. [*Kayemullah's case* (1) was tried in 1897] when there were other provisions relating to European British subjects). Similarly we may refer to cases where cognizance may not be taken except in certain instances, (sections 196, 196A, 197 in this case, i. e., trial of Judges, Magistrates, and certain Government servants, Government may determine the Court which shall try the matter). Section 526A relating to persons subject to the Naval Discipline Act or to the Army Act, provides that in certain circumstances, the High Court must try the case. Incidentally it may be noted that sections 197 and 526A are instances where there is statutory recognition of the fact that apart from the question of punishment, and the nature of the offence, the position of the accused should be taken into account in determining the tribunal. There appears to be no *a priori* reason why discretion should not be left to Magistrates, to some extent, to determine the nature of the tribunal, apart from the question of punishment and the nature of the offence. In the case of sedition there appears to be statutory recognition of the fact that Magistrates differ in calibre. Cases under section 124A may be tried by the Chief Presidency Magistrate, District Magistrate, or any Magistrate of the first class specially empowered. Other Magistrates must commit to the Court of Session. Even without the provision there does not appear to be any *a priori* reason why a junior Deputy Magistrate faced with a difficult sedition case might not think it ought to be committed to the Court of Session, even though he could almost certainly punish adequately, while a more senior and experienced Magistrate might think he could try the case. A more senior Magistrate might not be available to whom the case could be transferred. And with the provision, there appears to be no *a priori* reason why the Chief Presidency Magistrate, in a sufficiently difficult and important case, might not commit the case. The intention of the provision would more reasonably seem to be to make it possible or specified senior Magistrates to try such sedition cases as they thought fit to try, while still leaving them power to commit if they think they ought to be tried by the Court of Session, quite apart from the question of adequate punishment, and not that these Magistrates must try all sedition cases if they think a years' imprisonment is adequate punishment, whereas all other Magistrates must commit all cases.

The intention of the Code would appear to start from the top and work downwards, to provide that all cases are triable by the

(1) (1897) 1. L. R. 24 Cajo. 489.

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higher Courts, only certain cases are triable by the lower Courts, and nowhere to provide [except in section 206(a)] that no case shall be tried by a higher Court. Schedule II, column 8, by what Court triable at first sight may appear to provide differently, but schedule II is only referred to in section 28(c) and must be read with that. On the face of it section 28 merely provides that certain cases shall be triable by Magistrates, and appears to give no warrant for the view that they must be so tried. If it were so, the provision would be a very clumsy one. For schedule II provided in many cases that offences punishable with 2 years' imprisonment with or without fine are to be triable by any Magistrate, no mention being made of Court of Session, yet as the learned Judges noted in *Kayemullah's* case (1) if the charge is under section 147, I. P. Code, as the fine is unlimited the Magistrate cannot give every punishment possible under the section. It is true that in certain cases, e. g., sections 385 and 500, 501, 502, I. P. Code, the schedule mentions Court of Session as well as Magistrate though the maximum imprisonment is 2 years, and also that in all cases where the maximum punishment is over 2 years both Court of Session and Magistrate are mentioned in the schedule. Strictly speaking in view of the provisions of section 28 it is unnecessary in these cases to mention more than the lower Court, i. e., the Magistrate as this includes the higher, but the fact that Court of Session is so mentioned does not in any way appear to support the view that cases where it is not mentioned must be tried by Magistrates, unless there is a chance of a fine of over Rs. 1,000 being required. For there are many cases where Court of Session is not mentioned which are not triable by a Magistrate if a greater fine than Rs. 1,000 is to be imposed, and in all cases where both Court of Session and Magistrate are mentioned, the Magistrate may try if he thinks he ought, and if he can adequately punish. In other words the mention of Court of Session in schedule II is not logically necessary in cases where the Magistrate may try, but that is so whatever view be held of the provisions of section 254, Cr. P. Code.

We now refer to Chap. XVIII "Of enquiry into cases triable by the Court of Session or High Court." Section 206(1) provides for what Magistrates may commit, and put a lower limit, i. e., excludes 3rd class Magistrates altogether, and 2nd class Magistrates not empowered under the section.

Section 206(2) provides the only upper limit, viz., that except as

(1) (1879) L. L. R. 24 Calc. 429.

provided no person triable by the Court of Session shall be committed for trial to the High Court.

Section 207 is unambiguous in its terms. "The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court."

If the view expounded in *Kayemullah's* case (1) is correct then this section is to be read with section 254, Cr. P. Code, and "in the opinion of the Magistrate ought" here means "the case is one which in the opinion of the Magistrate he cannot adequately punish." The obvious comment is that if the section meant this, there is no reason why it should not have said so. On the plain meaning of the words there is no limit to what cases may be committed except the discretion of the Magistrate. Above we have shown that *a priori* there is good reason to believe that there was no intention to have any such limit. If the words are taken at their plain meaning then section 254, Cr. P. Code, never comes in question. The Magistrate has a case before him, which in the due exercise of the discretion given to him by the section (read with section 28) he is of opinion should be tried by the Court, of Session, and he then follows the procedure in Chap. XVIII. It applies whether the case be a summons case or a warrant case. He proceeds with the case. If he finds there are not sufficient grounds for committing the accused, then under section 209, Cr. P. C., he discharges him, unless it appears the accused should be tried before himself or some other Magistrate. Here, if anywhere, we should expect the provision about adequate punishment. If the view in *Kayemullah's* case (1) is correct, the provision here should be "unless it appears to the Magistrate that the accused can be adequately punished by himself or some other Magistrate." But in fact the words are as wide as in section 207, Cr. P. C. In other words apart from the question of punishment, the Magistrate may think the case ought to be tried by the Court of Session, and proceed under Chapter XVIII, but he may change his mind, again apart from the question of punishment, and decide to proceed and try the case himself, or send it to another Magistrate for trial. The latter case would occur if the commitment proceedings were being held before a Magistrate of the 2nd class, who might think the case one fit to be tried by a Magistrate of the 1st class. Of course the wide words in sections 207 and 209 both cover the question of

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adequate punishment, i. e., all cases where the Magistrate cannot adequately punish are *ipse facto* cases which ought to be tried by the Court of Session.

We next come to the provisions of Chapter XXI of the trial of warrant cases by Magistrates. Section 251 reads "The following procedure shall be observed by Magistrates in the trial of warrant cases." I would point particularly to the word "trial." Where the Magistrate has decided that the case is one which ought to be tried by the Court of Session he has proceeded under Chap. XVIII with the procedure for commitment, and no question of trial of a warrant case comes in; i. e., no question of the provisions of Chapter XXI.

The decision in *Kayemullah's case* (1), and the present case appears it is submitted with respect, to be based on the view that all proceedings in warrant cases (at any rate if they are shown in schedule II as triable by a Magistrate) are necessarily trials of such cases up to the point of charge, and then section 254 settles the matter as to whether the case is to be committed or not. It is submitted that this is not the intention of the Code. Chap. XXI relates only to the trial of warrant cases and section 254 is intended only as a warning, and limit to the power of trial. The Magistrate has already decided to try the case, i. e., that it is not one that ought to be tried by the Court of Sessions. He then reaches the stage of charge, and is warned in section 254 that he must not proceed unless the case is triable under the chapter, (i. e., is not exclusively Sessions triable), unless he is competent to try it, (i. e., in the case of 3rd and 2nd class Magistrates, or say in a section 124A case has the necessary powers), and unless he can adequately punish it. If he has already thought of punishment, and decided to commit on that ground and proceeded under Chap. XVIII well and good, if not, he is here warned not to exceed his powers. It is difficult then to see what other word than "shall" could be used in the following direction that, if all these conditions are fulfilled he "shall" frame a charge in writing. It appears with all respect to be straining the words to interpret into this "shall" that it is meant to over-ride and limit the wide ordinary meaning of the words in section 207 and section 209, Cr. P. Code, and the apparent intention of the Code as given above on *a priori* ground.

There is more in the matter than this. If the words of the section were interpreted in practice more strictly, it would only emphasize the correctness of the view at present expressed. The section states that if "at any previous stage of the case there is

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ground for presuming that the accused has committed an offence triable, etc., he shall frame a charge." At present in the more complicated type of case which it is not uncommon to try before a Magistrate, violent protests are raised by the accused if it is proposed to frame a charge while anything more than a formal witness remains to be examined, even though there may be abundant ground for presuming that the accused has committed an offence triable under the Chapter. The clear intention of the section is that a trial under the chapter before a Magistrate shall be a more summary procedure than the trial before a Court of Session. The accused naturally protest because the form of trial is sometimes unsuited to the type of case to which it is applied, and in many cases it would be unfair to ask the accused to cross-examine material witnesses while others remain to be examined. The practice therefore is to make the trial before a Magistrate approximate more to a trial before a Court of Session, to examine all the witnesses except at most formal ones before charge, so that the accused knows the full case he has to meet, and then to give him time to cross-examine. The same result is reached in a trial before the Court of Session, by the witnesses being examined first before the Magistrate during commitment. The accused has then time before the trial to prepare his defence. Warrant case procedure is meant to be a stage between summons procedure where cross-examination must be performed at once, and Sessions procedure where the whole prosecution evidence (except at most formal evidence) is before the accused for sometime, before he is asked to cross-examine. The real answer to the protests of the accused in warrant case trial, is not to ignore section 254, Cr. P. Code, and delay framing charge but to say that, it is evident that the case is one which should be tried by the Court of Session. This point of course has nothing to do with the question of punishment.

Having framed a charge during a trial under Chapter XXI or at any stage before signing judgment there is provision in section 347, Cr. P. Code, for committing the accused to the Court of Session. (There is provision in section 346, Cr. P. Code, where the Magistrate thinks the case should be tried or committed by another Magistrate.) Here again we should surely expect the section to refer to adequate punishment, and not be in the wider words of sections 207 and 209. Section 254 mentions all the possible grounds on which the case must be committed, i. e., that the offence is not triable under the chapter, that the Magistrate is not competent, and that he cannot adequately punish, why then introduce wider words

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in section 347, Cr. P. Code, if there are no other grounds; if the case must be tried by the Magistrate if these three conditions are not present. Surely the only possible interpretation is that this section, as it were, extends the provisions of section 207, Cr. P. Code, and Chapter XVII to trials of warrant cases, just as section 209 extends the provisions of Chapter XXI to cases where the Magistrate has changed his mind in commitment proceedings, and decided that the case is not one which ought to be tried by the Court of Session.

In fact *Kayemullah's* case (1) was committed under the provisions of section 347, Cr. P. Code, though the learned Judges never referred to that section in their judgment. Hence it was a case to which section 254 did at one stage apply, the Magistrate tried the case under Chapter XXI up to the stage of framing a charge, and then proceeded under section 347, Criminal Procedure Code, under a misapprehension. It was a case referred by the Sessions Judge for quashing as illegal, and one in which the accused was represented before the High Court, and where there was an argument for the accused against the order of commitment. It was a case where the Magistrate had admittedly committed an error, where the Sessions Judge, and the accused, and probably the Magistrate when he saw his mistake, each thought the commitment should not stand, i. e., a fit case for quashing the commitment on general grounds, where no one really wanted to oppose the quashing of the commitment. It is unfortunate, that such a case should form the foundation for such an important decision on a very important provision of the Code affecting the question of the whole power of Magistrates to commit cases to sessions. The other case quoted on the point, viz., the case of *Emperor v. Bindheswari Goshain* (2), is a decision by one learned Judge of the Court, in a case in which the parties were not represented, where the learned Judge adopts in a very short judgment, the reason suggested by the Sessions Judge, which themselves are based on *Kayemullah's* case (1). Moreover it was again a case in which the Magistrate had apparently made a mistake, and been of the opinion that the case was not triable by him.

Section 348 must be referred to as the words "adequate sentence" appear there. The reason is historical. As the section now stands the first paragraph is now superfluous except in so far as it provides for transfer to a Magistrate empowered under section 30. As it now stands it merely repeats the provisions of section

(1) (1879) I. L. R. 24 Cal. 429.

(2) (1919) I. L. R. 41 All. 454.

254 except that it puts the situation the other way round, and states the Magistrate shall commit unless he is of opinion that he can adequately punish. In the Code of 1882 the section stood that the Magistrate shall "ordinarily", if he considers the accused to be a habitual offender commit him to the Court of Sessions. The provision appeared in the Police Act XIII of 1856.

Doubtless here the idea was to limit generally the discretion of the Magistrate as to punishment in such cases, whereas the latter Codes allowed him discretion, if he thought he could adequately punish, to try the case and give such punishment i.e., allowed him to think that 2 years' imprisonment or less might be adequate in such cases, while the earlier Code barely gave him any such option. The result now of the amendment is merely to repeat the ordinary provisions of section 254, Criminal Procedure Code. In such cases the only reason for commitment ordinarily would be the question of punishment, as they are ordinarily simple cases, such that any Magistrate might reasonably try.

Doubtless the question of punishment should ordinarily indicate the dividing line between what cases ought to be tried by the lower courts and what by the higher courts, the higher the punishment to be inflicted the higher the tribunal that should try. But it is submitted that the code does not intend to nor does it in fact make this the only consideration.

We may again refer to the word "adequately" in section 254, Criminal Procedure Code. Punishments in section 53 of the Indian Penal Code are graded in order of severity. Imprisonment is severer punishment than fine. A Magistrate may think that he could more than "adequately" in fact to severely punish in a case, viz., that he could give say a sentence of 6 months' imprisonment, whereas a more appropriate punishment would be a lesser one of fine exceeding Rs. 1,000. If section 254 is strictly interpreted, then the Magistrate because he thought he could, not only adequately, but more than adequately punish the offence, could not commit the case at all for if "ought" in section 207 is to mean the same thing as section 254, Criminal Procedure Code, and section 207 is as limited as section 254 both limit his powers to convict. This *reductio ad absurdum* may appear to be a mere verbal quibble, but it shows that "adequately" in section 254, Criminal Procedure Code, if the view in *Kayamulla's case* (1) is sound law, is used in a very loose sense.

Again reference may be made to the case of forgery section 465,

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Indian Penal Code. Under the 1898 Code, this, an offence punishable with imprisonment for two years or fine or both, was triable only by the Court of Sessions, i.e., although any first class Magistrate could in almost every case give a suitable punishment. There was recognition of the fact that this was a type of case which always "ought to be tried by the Court of Sessions", apart from the question of punishment. The offence has now been made triable by a Magistrate. If the view given in *Kayemulla's* case (1) is correct, then the legislature intended at once to change from the position in which all forgery cases were triable only to the Court of Session, to one in which practically all were triable only by a Magistrate. It is submitted with respect that this was not the intention, and that there is no reason still why important and difficult forgery cases under section 465, Indian Penal Code, should not be committed to the Court of Sessions.

Reference may also be made to sections 315 and 532, Criminal Procedure Code. These show that a commitment once made should be held good if reasonably possible. No commitment made by a competent Magistrate or Court can be quashed except by the High Court and on a point of law. Under section 532, even where the commitment is made by a Court purporting to have powers duly conferred which were not so conferred, the Court to which the case is committed is not bound to quash the commitment, if no objection has been made to the jurisdiction of the Magistrate, and if the accused has not been injured.

If the view in *Kayemulla's* case (1) is correct then section 487(a) of the Code of Criminal Procedure contains an entirely unnecessary provision. This states that nothing in section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to the High Court. Section 482 refers to the case in which the court considers in any case that a person accused of the offences referred to in section 480 and committed in its view should not be dealt with under section 480. Section 480 refers to offences described in the following sections, the maximum punishments for which are shown against each, viz. :—

Section 175, I. P. Code, simple imprisonment for 1 month or fine Rs. 500.

Section 178, I. P. Code, simple imprisonment for six months or fine Rs. 1,000.

(1) (1879) I. L. R. 24 Calc. 479.

Section 179, I. P. Code, simple imprisonment for 6 months or fine Rs. 1,000.

Section 180, I. P. Code, simple imprisonment for 3 months or fine Rs. 500.

Section 228, I. P. Code, simple imprisonment for 6 months or fine Rs. 1,000.

In each of these cases a first class Magistrate can inflict the maximum punishment both of fine and imprisonment. According to the view in *Kayemulla's* case (1), such Magistrates cannot commit such cases owing to the provisions of section 254, Cr. P. Code. If so the provision in section 487(2) appears to be unnecessary so far as it refers to section 482.

We may also refer to section 478, Cr. P. Code, which gives powers to Civil or Revenue Courts to commit to the High Court. Such Courts have no power to try cases, so that section 254 cannot come into question. In this section the same wide words as in section 207 are employed, and the Civil or Revenue Courts are empowered to commit cases exclusively triable by the High Court or Court of Session, and such cases as they think ought to be tried by the High Court. There is a provision that in the inquiry, the Court shall have all the powers of a Magistrate under Chapter XVIII or Chapter XXXIII where that chapter applies. If the intention that the words "ought to be tried" should only cover cases where it was thought that a punishment of more than two years imprisonment, or a fine of more than Rs. 1,000 should be imposed, here if anywhere, it was necessary to make a clear provision that all other cases should be sent to a Magistrate to try.

Lastly we may refer to the provisions of section 526, Criminal Procedure Code as showing that the Code recognises that there are cases where the trial should be by a higher court apart from the question of punishment. The section provides amongst other things that, for example on the ground that a point of law of unusual difficulty is likely to arise or that an order under the section will tend to the general convenience of the parties, as well as that a fair and impartial trial cannot be obtained in a subordinate Court, that the case may be ordered to be committed to the Court of Session. There appears to be no valid reason why a Magistrate, if he has a case before him, to which any of the conditions apply, might not be allowed to commit the case to the Court of Session. As already shown the provisions of the relevant sections are amply capable of bearing such an interpretation, and it is submitted with

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respect, only by straining the importance of one section (i.e., section 254) and one word of that section (i.e., shall) and by giving it an undue prominence can such a reasonable and convenient view be held to be wrong.

It is submitted therefore with great respect that an analysis of the provisions of the code abundantly supports the view that *Kayemulla's* case (1) was wrongly decided, and decided contrary to the clear provisions of the legislature.

The present case under section 103 of the Presidency Towns Insolvency Act is peculiar in that punishment is unusually severe, as there is no option to fine the accused only. I may further point out that there is no appeal on facts against a sentence of imprisonment of 6 months or less imprisonment by a Presidency Magistrate. It would, it is submitted, be strange if it were held that Presidency Magistrates must try all cases triable by them where they think that 6 months or less is adequate punishment, and that no matter how complicated or important the case, if the punishment is to be less than this, the Magistrate must by law be the sole Judge of the facts, with no right of appeal to any higher Court, and with no opportunity given to the Magistrate to pass over the duty of decision to the higher Court. With all modesty I can say there are cases tried by me in which the appropriate punishment is not more than six months which I should not think fit to be tried by other Presidency Magistrates. I cannot think that the correct law is that there are no cases, which the Code shows as triable by me, where the appropriate punishment is 6 months or less, in which I might not hold reasonably the opinion that it would not be fair to constitute myself the sole and final arbiter of fact. In *Kayemulla's* case (1) the question of the powers of the Presidency Magistrates of course did not arise, but on the general question here raised it is, I submit, of considerable importance.

NOTE IV.—Discussion of the question whether a Magistrate is or is not bound to try case in which he can inflict 'adequate punishment'—sections 207, 254, 247, Cr. P. Code.

(c) With reference to the history of legislation in regard to Criminal Procedure in India, in particular with reference to the Codes of 1861, 1872, 1898, 1923.

History—It is not without interest to trace the history of the appropriate sections.

The discussion throws some light on difficulties that have arisen in connection with the sections, in particular on sections 207, 209, 215 and 347. Until 1882, Presidency Magistrates did not come

(1) (1897) I. L. R. 24 Calc. 429.

under the Code of Criminal Procedure. Their procedure (as Police Magistrates) was governed by the Police Act XIII of 1856, amended by the Calcutta Police Act IV of 1866, up till 1877, when the Presidency Magistrates Act (IV of 1877) was passed. Commitments to the High Court and trials by the High Court, were governed by the High Courts Act 24, 25, Vict. Reg. ch. CIV i.e., by English procedure, and by such Acts as the Criminal Procedure Supreme Courts Act XVI of 1852, XVIII of 1862 (which repealed Act XVI of 1852 in those parts of British India in which the Indian Penal Code of 1860 was in force) and the High Courts Criminal Procedure Act X of 1875. After 1882 the procedure was substantially the same as it now is. Thus the Criminal Procedure Codes of 1861 (amended by Act VIII of 1869) and 1872 contain no provisions relating to the procedure in trials by the High Court. The latter Code of 1872 does contain provisions for commitments to the High Court, in cases where European British subjects are involved.

The first point to be considered is that relating to the definitions of "enquiry" and "trial" for to some extent the schemes of the Codes are bound up with those definitions, and their provisions are to be read in the light of the definitions, and the schemes they indicate.

In the Code of 1861 we have "enquired into." The words "enquired into" shall be deemed to comprise every proceeding preliminary to trial, and the word "determined" to comprise trial, and every subsequent proceeding, including the punishment of the offender.

In the Code of 1872 we have, Inquiry—"Inquiry includes any inquiry which may be conducted by a Magistrate or Court under this Act" "'Inquired into' means and includes every proceeding preliminary to trial." Trial—"Trial means the proceedings taken in Court after a charge has been drawn up, and includes the punishment of the offender."

"It includes the proceedings under chapter XVI (Trial of Summons Cases) and XVIII (Summary Trials), from the time when the accused appears in court."

It is interesting to note that the Presidency Magistrates' Act, includes no definition of 'trial' or 'enquiry'.

In the Code of 1882 we have: Inquiry—"Inquiry includes every inquiry conducted under this Code by a Magistrate or Court.

Trial—There is no definition of "trial" in this Code.

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In the Code of 1898 we have: Inquiry—"Inquiry includes every inquiry other than a trial conducted under this Code by a Magistrate," or Court.

There is no definition of trial.

In the Code of 1923, we have the same definition of "inquiry" and again no definition of "trial."

The provisions in the Code of 1861 to distinguish between "enquiry" and "trial" do not appear to have been very clear and hence we have the amendment of 1872, where a very clear distinction is made. In the Code of 1861, the only place where I can find "determined" is in section 233 "when the Magistrate has determined to send the accused before the Court of Session for trial. etc."

In the Code of 1861, chapter XII "Of preliminary enquiry by the Magistrate in cases triable by the Court of Session," we have the appropriate provisions, starting from the complaint. Similarly we have in chapter XIV. "Of cases triable by the Magistrate in which a warrant on complaint may issue," the appropriate provisions starting from the complaint. In this Code there is not a separate provision for "Commencement of Proceedings," and "Complaints." Chapter XIV simply states in sections 249 and 250, that the provisions of chapters XII and XIII apply in such cases, but the word 'determined' does not appear, though the chapter talks later of "trial."

Thus we have two separate chapters for cases to be committed and those to be tried, and referring to the definitions, the idea, though not as clear as it might be, appears to be for provision for enquiry before trial in each case.

In Chapter XII, section 179 we have 'when a complaint is made that any person has committed any of the offences specified and triable exclusively by the Court of Sessions, or which in the opinion of the Magistrate ought to be tried by the Court of Session, &c.' Again section 226 "When evidence has been given which appears to be sufficient for the conviction of the accused person of an offence which is triable exclusively by the Court of Session or which, in the opinion of the Magistrate, is one that ought to be tried by the Court of Session, etc." If the Magistrate is a Justice of the Peace and the accused is a European British subject, he shall be sent for trial before the Supreme Court of Judicature.

There is no provision as to the manner of trial by the Supreme Court, and no provision corresponding to 215, Criminal Procedure Code (1923) for quashing any commitment.

"Again section 256 corresponds to present section 347 and provides for commitment if from any cause the same is one which the Magistrate is not competent to try, or which, in the opinion of the Magistrate, ought to be tried by the Court of Session, the Magistrate shall stop further proceedings under this chapter, and shall proceed in accordance with chapter XII of this Act for conducting the preliminary enquiry in cases triable by Court of Session."

Thus the present wide words of sections 207, 209 and 347 date from the first Code of 1861, and moreover that Code contains no words adequately punish as in section 254 of the present Code.

In the Code of 1872, there are some wide differences. "Trial" is defined in the clearest terms but there is again some confusion for Chapter XVII is headed "Trial of warrant cases by Magistrates" and then goes on to make provisions for the proceedings before charge, which are not "trial" according to the definition. In this Code, the preliminaries of "complaint" and "summons" are separately provided for in separate chapters. Chapter XV "Of enquiry into cases triable by the Court of Session of High Court" begins with section 189. 'The following procedure shall be adopted in inquiries before Magistrates in cases triable by the Court of Session or High Court.' This means according to the schedule, in all cases, as by note 3 all cases shown as triable by a Magistrate, are triable by the Court of Session.

Section 195 runs "When the Magistrate finds that there are not sufficient grounds for committing the accused to take his trial before the Court of Session or High Court, he shall discharge him, unless it appears to the Magistrate that such person should be put on his trial before himself, in which case he shall proceed under Chapter XVI (Summons cases) XVI., (Warrant cases) or XVIII (Summary trials.)"

Section 196 enacts a similar provision to that in section 226 of the Code of 1861, and in similar terms.

"When evidence has been given by a Magistrate, which appears to justify him in sending the accused person to take his trial for an offence which is exclusively triable by the Court of Session or the High Court or which, in the opinion of the Magistrate is one which ought to be tried by such court, the accused person shall be sent for such trial before the Court of Session or High Court as the case may be."

The section makes provision for the commitment by mufassil Courts of European British subjects to the High Court.

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Chapter XVII "Of the trial of warrant cases by Magistrates" begins with section 213. The following procedure shall be observed by Magistrates in the trial of warrant cases. Then section 214 states that the provisions of chapter XV, sections 190-194 apply to trials under this chapter. This is rather confusing, in view of the definition.

Then we have section 221 providing that "in any trial" if the case is one he thinks ought to be tried by the Court of Session or High Court, he shall "stop further proceedings," etc., following the words of section 256 of the Act of 1861.

Section 216 provides if the Magistrate finds that an offence is apparently proved against the accused person, which such Magistrate is competent to try, and which in his opinion, could be adequately punished by him, he shall prepare in writing a charge against the accused person.

This is the first appearance of the words of present section 254 "adequately punish." Moreover, in this Code there is no provision as to enquiry where the Magistrate thinks the case "ought to be tried" by the higher Court, as in section 207 now. But the provision appears in section 197 corresponding to section 226 of the Code of 1861. This Code of 1872 has also the wide words quoted in section 195, "unless it appears that the accused should be put on his trial before himself." The reason appears to be that the scheme was to make the "enquiry" provisions apply to all cases, up till charge, in view of the clear definition of trial, and it left section 196 and section 221 to enunciate the general principle that cases could be committed which the Magistrate thought ought to be tried for any cause by the higher Court. It is significant that in the later Codes the old section was restored by section 207. Moreover, the wording of this Code, would appear to give better authority for the view that the Magistrate must try if he can adequately punish, it was on this Code that the rulings in 3 Mad. 289 and 3 Cal. 495 were based, and they clearly enunciate the contrary.

When we turn to the Code of 1882, we find that the definition of "trial" has been abolished and it is evident that the intention is that the apparent illogicality of the earlier Codes should be removed, that all proceedings in the chapter XXI and of the trial of warrant cases by Magistrates for example shall be taken as "trial." There is in fact no need for the definition of trial.

The Code provides for all trials by Court of Sessions and High Court, and in section 207 we return to the wording of section 179

of the Code of 1861. Then we have a curious amendment which has led to some confusion and to further amendment in 1923, I refer to section 347. This, which repeats section 256 of the Code of 1861, and section 221 of the Code of 1872, is taken out of its place in the Chapter of warrant trials and put in a general chapter, and the words "become in any inquiry before a Magistrate, or in any trial before a Magistrate before finding judgment, &c." I have not the materials before me, but it is not a far-fetched guess that the words "before signing judgment" were put in as a result of the decision in *Kudruteola's case* (1). As that was a decision to the effect that section 221 of the Code of 1872 intended so to enact. The mystery is, why the section was made to apply to "any enquiry." It brings it into conflict with Chapter XVIII, and the words stopped further proceedings and commit the accused under the provisions hereinbefore contained are self-contradictory. I may surmise again that the amendment was made with an eye on the provisions of the Code of 1872, and if the definition of "trial" there had stood, the amendment would have been understandable. Under that definition, there was a sort of enquiry stage in a "trial" of a warrant case and the words, like the words "before signing judgment" could be understood as put in to cover the whole stage of a "trial" in a warrant case. But in the 1882 Code, this confusion of the previous Codes was removed, and the only enquiry "left, was that under Chapter XVIII." These words "In any enquiry before a Magistrate" are therefore unnecessary. In amending the section in 1923, to remove the difficulty it appears that the wrong words, viz., "stop further proceedings" were removed. Those words were quite clear in reference to a "trial," the Magistrate was to stop further "trial" proceedings and continue under chapter XVIII. The section would have been clear if the word "In any inquiry" had been omitted and the words "stop further proceedings" been allowed to remain. Removing the section to a general chapter makes it clear that it applies to trials in summons cases, and summary trials. The subsequent amendments in the Codes, do not affect the question.

The discussion above then shows how since 1882, the "trial" chapter relating to warrant cases has been clearly distinguished from the "enquiry" into cases which the Magistrates think "ought to be tried" by the Court of Session, and shows that there is no warrant for making the provisions of section 264 referred to section

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207. In fact those wide provisions were put back after having been omitted from the Code of 1872, which introduced the words "adequately punish" into the section corresponding to section 254 Cr. P. Code.

The point is made even clearer by reference to the Presidency Magistrates Act IV of 1877. This is a Code of Criminal Procedure for Presidency Magistrates and many of its provisions are identical with those of the Code of 1882. Nevertheless it contains no definition of "enquiry" or "trial" at all.

Chapter VIII is "of enquiry into cases triable by the High Court." Section 81 runs "cases, triable by High Court in the exercise of its Ordinary Original Criminal Jurisdiction, or which, in the opinion of the Presidency Magistrate before whom the accused person is brought, ought to be tried by such Court," shall be enquired into by a Presidency Magistrate; and in such enquiry he shall adopt the following procedure. Section 87 corresponds to present section 209, Cr. P. Code. Section 88 repeats section 226 of the Code of 1861, providing for commitment when there is evidence justifying commitment: for an offence triable exclusively by the High Court, or which, in the opinion of the Magistrate ought to be tried by such Court. Section 89 corresponds to section 233 of the Code of 1861.

"When the Magistrate determines to commit the accused person for trial before the High Court, he shall after the evidence has been recorded frame a charge under his hand declaring with what offence the accused person is charged, and (subject to the provisions of the High Courts Criminal Procedure Act, 1875) committing him for trial by such Court on such charge."

Chapter X is "Of the trial of cases by Presidency Magistrates" there is no separate chapter for summons cases, the procedure described is a mixture of the present procedure for summons cases and that for warrant cases. No evidence need be recorded if less than six months imprisonment or a fine of over Rs. 200 is to be awarded. In cases "in which the Magistrate has power to impose imprisonment for a term exceeding six months" (i. e., now called warrant cases) there shall be a formal charge on the day fixed for trial, the substance of the complaint is to be stated to the accused and he shall be asked if he has any cause to show why he should not be convicted. If he shows no cause evidence is taken. A charge is to be drawn up where necessary as soon as the Magistrate is of opinion that a prima facie case is established.

Finally section 127 corresponds to section 256 of the Code of

the powers conferred on them thereby as being the same as those of two Justices of the Peace.

Thus when the Presidency Magistrates Act IV of 1877 was enacted, making a whole series of offences as given in the schedule therein triable by Magistrates, it would indeed have been a "startling proposition," if it had been the fact that they were thereby compelled to try all those offences in cases where they thought a punishment of 2 years' imprisonment was adequate.

If this was the position, there has been no subsequent amendment to suggest that the position has changed. This concludes the historical discussion to throw light on the question whether it was ever intended to enact that Magistrates have no discretion in committing cases to Sessions, beyond consideration of the question of punishment.

The history of the earlier procedure, and the amendments made in 1872 are clearly set out by Sir James Fitz James Stephen in his "History of the Criminal Law of England" in Vol. III. In pages 323 et seq. he discusses at length the terms of the Code of 1882, with some reference to previous history. In his analysis relating to trial and commitment at page 335 he states.

"The case may be one which the Magistrate is competent to dispose of himself, and which he thinks would be sufficiently punished on conviction by the exercise of his judicial powers. In this event he ~~may~~ proceed to try the case."

And later "The Magistrate, however, may not be competent to try the charge brought against the accused, or may consider that the case ought to be sent for trial before the Court of Sessions."

As he was the Law Member responsible for putting through the Code of 1872 his views are entitled to consideration.

The Reference then came up for hearing before Suhrawardy and Jack JJ. who made the following order of Reference to the Full Bench.

Order of Reference.

This is a Reference by the Chief Presidency Magistrate under section 432 of the Code of Criminal Procedure under the following circumstances. On the complaint of one of the Judges of this Court presiding over the Insolvency Court, the accused in this case were placed for trial before the Chief Presidency Magistrate on a charge under section 103 of the Presidency Insolvency Act. The learned Magistrate thought that the case was one which was fit to be tried in the High Court Sessions and committed the accused to the Sessions. On the matter coming up before Mr. Justice Buck-

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land presiding then over the High Court Sessions, the learned Judge, being of opinion that the commitment was illegal, quashed it and sent the case back to the trial Magistrate with the following order: "The order will be that the commitment be quashed. The record with a copy of the judgment will be returned to the Chief Presidency Magistrate in order that he may deal with the complaint according to law." On the matter going back to the Chief Presidency Magistrate it was urged on behalf of the accused that the effect of the order of Mr. Justice Buckland was that the accused stood discharged and that the proceeding could not be continued against them without a fresh complaint. The learned Chief Presidency Magistrate feeling doubtful about the matter has made this Reference and has submitted the following points for the decision of this Court: "(i) What is the correct interpretation of section 215 of the Code of Criminal Procedure? (ii) Does it give power to the Judge presiding at the Sessions to quash a commitment made to him by a competent Magistrate? (iii) Does it refer to a power of the High Court in its Revisional Jurisdiction? (iv) Does it refer to both of these powers? (v) If it gives the power referred to in (iv), what is the effect when the Judge so presiding quashes a commitment? Has it, as suggested by the accused in their petition, the effect of a discharge, so that the committing Magistrate has no further jurisdiction in the matter, in the absence of a fresh complaint or can the Magistrate proceed with the case as it stood prior to his passing the order of commitment? (vi) Subsidiary to the question raised in (v) is the question whether the Judge presiding at the Sessions has power to direct what shall be the effect of his order quashing the commitment. (vii) The learned Judge in the present case has quashed the commitment on a point of law, viz., that the charge in the case under section 103 of the Presidency Towns Insolvency Act is one punishable with a maximum imprisonment of two years, that this being not more than the maximum punishment the Magistrate could award, his order of commitment was illegal."

It is to be noted that the offence under section 103 of the Presidency Insolvency Act is punishable with imprisonment for two years and is within the competency of the trial Magistrate.

Two principal points emerge out of the facts of this case for determination—(1) Whether the learned Judge presiding over the High Court Sessions had power under the law to quash the commitment. (2) Whether the commitment by the Chief Presidency Magistrate was illegal and *ultra vires*.

As regards the first point, we have grave doubts as to the powers of a Judge presiding over the High Court Sessions to quash a commitment made by a competent Magistrate. The learned Judge purported to act under section 215 of the Code of Criminal Procedure. That section says that the commitment once made by a competent Magistrate can be quashed by the High Court only. Now, the learned Judge is of opinion that the expression "High Court" in that section includes a Judge presiding over the Sessions of this Court and in support of that view he has referred to section 266 of the Code of Criminal Procedure. That section, to our mind, does not include within the term "High Court" a judge presiding over the Criminal Sessions of that Court. There is no complete definition of "High Court" in the Code but in section 4 clause (f) it is said to include several Courts which are not ordinarily called High Courts but which exercise the powers of the highest criminal Court of appeal. Section 266 does not extend or limit the connotation of the expression "High Court" in section 4 but enumerates certain courts for the purpose of chapter XVIII excluding certain other courts which are mentioned in section 4. Section 266 enumerates the Courts which are to be considered as High Courts for the purpose of section 267 which lays down that all trials before a High Court shall be by a jury. In section 273 the terms "High Court" and "Judge" are both used. It says that when it appears to the High Court—meaning High Court as enumerated in section 266—that any charge is clearly unsustainable the Judge (who is appointed to carry out the functions of the High Court under Chapter XVIII) may make on the charge an entry to that effect. It seems to us that the High Court as mentioned in section 215 is the High Court the powers of which are exercised by a Bench appointed by the Chief Justice. The proper Court, therefore, which can quash the commitment under section 215 is a Criminal Bench so constituted. This point has not come up for decision up to now, but it was adumbrated in the case of *Phanindra Nath v. Emperor* (1) where one of the Judges constituting the Bench expressed his doubt as to whether in the exercise of the ordinary appellate jurisdiction the Criminal Bench had power to quash a commitment made to the High Court for trial under its ordinary criminal jurisdiction. But the point was left undecided as the application before the learned Judges failed upon some other ground. We do not see any reason why

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this Criminal Bench being constituted by the Chief Justice for trial of criminal cases has no jurisdiction to quash a commitment to the High Court Sessions in view of the fact that the commitment was made by the Chief Presidency Magistrate who is amenable to our ordinary appellate and revisional jurisdiction. We are clearly of opinion that the learned Judge presiding over the High Court Sessions had no power under section 215 to quash the commitment.

The second point adverted to above raises a question of some difficulty on which there is a considerable divergence of opinion. If, as we are of opinion, the learned Judge presiding over the High Court Sessions could not act under section 215, he had jurisdiction to quash the commitment under section 532. The proper object of the enactment appears to be that where a commitment has been made a Magistrate who is not competent under section 266 to make it the Court of Session or the High Court may quash the commitment if it is of opinion that it has injured the accused or if objection was taken to the legality of the commitment at an earlier stage. The section, as has been observed in *Emperor v. Madhav Laxman and another* (1) has no application where the Magistrate who committed had the power, and the proper procedure would be to make a reference to the High Court with a recommendation that the commitment should be quashed presumably under section 215 of the Code. But if it is construed as including a case of a Magistrate having jurisdiction to commit but making a commitment not warranted by law the question that falls for determination is whether in the present case the learned Chief Presidency Magistrate acted without jurisdiction in committing the case to the Sessions. Mr. Justice Buckland has held relying upon the decision of this Court in *Queen-Empress v. Kayemullah Mandal* (2) that the maximum punishment awardable under section 103 of the Presidency Insolvency Act being within the competence of the Magistrate he had no power to make the commitment unless he was of opinion that he could not inflict adequate punishment which opinion he could not entertain in the present case. In *Kayemullah's* case (2) the commitment was made by a Magistrate on a charge under section 147, Indian Penal Code. The case was heard by a Division Bench of this Court, and it was held that the commitment was not necessarily illegal inasmuch as the offence under section 147 is punishable with an unlimited amount of fine which might be beyond the

(1) (1918) 1. L. R. 43 Bom. 147 (153). (2) (1897) 1. L. R. 24 Calc. 429.

power of the Magistrate to impose. But the learned Judges went on to say that as the Magistrate did not think that he considered that case to be one in which he was not competent to inflict an adequate punishment he could not under section 254 of the Criminal Procedure Code commit the case to the Sessions. The view taken in *Kayemulla's* case (1) has been followed in several cases in Bombay and Allahabad of which it is enough for our present purpose to refer to two of the latest decisions, namely, *Emperor v. Achaldas Jethamal* (2) and *Emperor v. Bindeshri Geshain and another* (3). On the other hand, several other High Courts, have taken quite a different view: *Crown Prosecutor v. Bhagavathi* (4); *The Crown v. Ali and others* (5); *King-Emperor v. Ishakat* (6). We have given our anxious consideration to this point due to the conflict of opinions, and we feel disposed to agree with the view taken in the Madras, the Punjab, and the Rangoon High Courts. The authority of *Kayemulla's* case (1) is to a great extent weakened by the absence of reference to an earlier decision of this Court, in which the point came up for decision. In the case of *The Empress v. Kudruteollak* (7), the prisoners were charged with rioting under section 147. The Sessions Judge made a reference to this Court with a recommendation to quash the commitment on the ground that as the Magistrate had framed charges under section 220 of the old Code (corresponding to section 254 of the new Code) he was bound either to convict or acquit the accused but had no power to commit him to the Sessions. The learned Judges held that the Magistrate had ample power under section 221 (347) to commit the accused at any stage. *Kayemulla's* case (1) and the order of Mr. Justice Buckland relied on section 254 of the Code and the opinion was expressed that when a Magistrate frames a charge under section 254 of the Code he must either convict or acquit the accused. With great respect we think that section 254 has no bearing on this question. If it is held that after charge is framed by a Magistrate under section 254 he is bound to try the accused himself and either to acquit or convict him, section 347 becomes to a great extent nugatory. Under that section the Magistrate can commit the accused at any stage of the proceedings before he has signed his judgment, if he is of opinion that it is a

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- (1) (1897) I. L. R. 24 Calc. 429. (2) (1925) I. L. R. 28 Bom. L. R. 293.
 (3) (1919) I. L. R. 41 All. 454. (4) (1918) I. L. R. 42 Mad. 83.
 (5) (1917) Cr. J. 54. (6) (1924) I. L. R. 3 Ran. 42.
 (7) (1878) I. L. R. 3 Calc. 495; 2 C. L. R. 2.

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case which ought to be tried by a Court of Session or High Court. If the Magistrate is empowered to commit the accused before he has signed his judgment that stage must arise after he has framed the charge under section 254 and finished the trial. The answer to the argument advanced in *Kayemullah's* case (1) that the Magistrate having framed the charge must either convict or acquit the accused is given in *Kudrutoolla's* case where the view is expressed that section 347 must be read as a proviso to section 254, namely, that the Magistrate must either acquit or convict the accused provided he decides not to commit him to the Court of Sessions. The learned Judge in *Kudrutoolla's* case (2) have very pertinently observed that though the explanation to section 220 of the old Code provided that if a charge is drawn up the prisoner must either be convicted or acquitted, it did not require that the conviction or acquittal must be by the Magistrate who drew it. We may in passing refer to the words "who in his opinion should be adequately punished by him." Those words were intended to cover a case when the Magistrate is of opinion that he could not sufficiently punish the accused. But they were not intended to put restrictions upon the power of the Magistrate given so widely under section 347 to commit for any reason whatsoever. The power to commit is conferred by sections 207 and 347. Under section 207 the Magistrate will commit the case to the Court of Session where it is exclusively triable by that Court or if in the opinion of the Magistrate it ought to be tried by such Court. The same words are repeated in section 347 which empowers a Magistrate to commit if he finds that the case which is not exclusively triable by the Court of Session should be tried by that Court. There is no limitation in law on the power of the Magistrate to commit if he is of opinion that the case ought to be tried by the Court of Session. There is, in our opinion, no justification for holding that the Magistrate can commit a case to the Court of Session, only when he cannot award adequate punishment. There may be cases where other considerations than adequacy of punishment may prevail upon the Magistrate to commit the case to the Sessions. One of such circumstances arose in the Punjab case where in a case of mutual riot the case against the other party was committed to the Sessions and the Magistrate thought that the case before him which was under section 147 should also be committed to the Sessions in order to avoid conflict of decisions on the same facts. Such cases came up for consideration before the Allahabad High Court also; and the learned Judges

(1) (1897) I. L. R. 24 Calc. 429.

(2) (1878) I. L. R. 3 Calc. 495.

were of opinion that the procedure adopted by the Magistrate was proper (1886 A. W. N. p. 356, 1900 A. W. N. p. 200). It must of course be conceded that when a Magistrate has committed a case which he should not have in the circumstances of that case committed such commitment may be quashed under section 215 on the merits. We may also refer to *Ananta Kaybutt* (1) where a commitment under section 147 was quashed, on the recommendation of the Sessions Judge by a Criminal Bench of this Court without assigning any reason. It may be noted here that in the case before us the Chief Presidency Magistrate had made up his mind at the beginning of the trial to commit the accused and proceeded with it under Chapter XVIII. But we are not concerned now with the question of the propriety or otherwise of the procedure adopted or of the order passed by him.

In the view that we entertain on the questions raised before us we answer the points enumerated in the letter of reference by the Chief Presidency Magistrate in the following way :—

Points Nos. 1-4.—In our opinion the Judge presiding over the High Court Sessions has no power to quash a commitment made to him by a competent Magistrate. It can only be quashed by the High Court in the exercise of its revisional jurisdiction.

Points Nos. 5 and 6.—If the Judge has the power to quash the commitment and if he acts under section 215 it seems to us that the accused should stand discharged but if the Judge acts under section 532 of the Code of Criminal Procedure, he has power to direct a fresh enquiry by a competent Magistrate.

Point 7.—According to the view we have expressed above the learned Judge was not right in quashing the commitment on the ground that the Magistrate had no power to commit unless he was satisfied that he could not award adequate punishment.

As the questions that were submitted before us for determination are all of general importance touching the right of the subject to claim the privilege of a trial by jury even in a case which is triable by a Magistrate, and where the Magistrate is also of the same opinion, we refer the following questions for determination to a Full Bench :—

(1) Has a Judge presiding over the Sessions of the High Court power under section 215 of the Code of Criminal Procedure to quash a commitment made to him by a competent Magistrate?

(2) Where in a case triable by a Magistrate and not exclusively triable by a Court of Session the Magistrate commits to the Court

(1) (1872) 17 W. R. 14 Cr.

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of Session being of opinion that it should be tried by that Court without saying that he could not award adequate punishment or the case is such where maximum punishment is within the competency of the Magistrate is the commitment without jurisdiction?

Under the High Court Rules (Appellate Side) the case is referred to a Full Bench for orders.

*Mr. Debendra Narain Bhattacharya*, (Officiating Deputy Legal Remembrancer) (with *Mr. Nirmal Chandra Chakrabarti*) for the Crown: The real point in the case is the and question referred to the Full Bench, which is as follows:—

"Where in a case triable by a Magistrate and not exclusively triable by a Court of Session the Magistrate commits to the Court of Session being of opinion that it should be tried by that Court without saying that he could not award adequate punishment or the case is such where the maximum punishment is within the competency of the Magistrate, is the commitment without jurisdiction?"

Now if this question is answered in the negative, that is to say, that such commitment is without jurisdiction then the first question referred to the Full Bench does not arise.

Now if such commitment is competent, it can be only done under S. 347 Cr. P. C. Section 347 is no doubt wide. But I submit that section 347 is limited by section 254.

At one stage of the trial namely at the stage where the Magistrate is to make up his mind as to whether he should frame a charge under section 254 then even section 347 is applicable and the whole question at this point of time is

(1) whether the accused has committed an offence triable under this chapter;

(2) the competency of the Magistrate to try it, and

(3) the adequacy of punishment.

These are the only tests at the time when section 254 comes to be applicable—a time when section 347 also has application.

Therefore, at this stage section 347 cannot be allowed to mean any further consideration than those stated above; it is unreasonable to think that at a later stage any consideration other than those and qualitatively new should guide the Magistrate in acting under section 347. Section 347 only carries the same considerations and continues them up till the time prior to signing the judgment.

These considerations would otherwise end with section 254. Section 347 only keeps these considerations alive till the signing of the judgment. This is the proper function of section 347.

Refers to Sir Henry Princep's Criminal Procedure Code. Now what are considerations other than those already mentioned which are claimed under the alleged extended and wide meaning of section 347. These are mentioned in the referring order namely the case may be otherwise complex, there may be an important question of law and such other things as stated at pp. 19 and 37 of the paper book. These are identical circumstances provided by section 526 (1) (b) (d) (e) (iv) and (3).

So if the Legislature has provided for these circumstances in section 526 and has given that power only to High Court why these same considerations or considerations analogous to them be read into. Section 347 empowers the Magistrate to commit on the ground that the language of section 347 is very wide.

The following judgments were delivered :

Rankin, C.J. :—On the 19th September 1928, Lort-Williams J., exercising the jurisdiction of the High Court under the Presidency Towns Insolvency Act (III of 1909 as amended by Act IX of 1926) and being of opinion that there were grounds for thinking that certain insolvents had committed offences under section 103 of the said Act, made a complaint under section 104 thereof to the Chief Presidency Magistrate of Calcutta. The Magistrate issued process on the accused and from the earliest stage of the proceedings determined to conduct them under chapter XVIII of the Code of Criminal Procedure, being of opinion that the case was one which ought to be tried at the High Court Sessions. On the 17th December 1928, he formally committed the three accused, Girish Chandra Kundu, Sudhir Chandra Kundu and Pramatha Nath Kundu accordingly. On the 8th of March 1929 the case came before Buckland J., in the Ordinary Original Criminal Jurisdiction of the Court. The learned Judge took the view that as on conviction for an offence under section 103 of the Act of 1909, the maximum punishment to which the accused is liable is imprisonment for a term which may extend to two years and as there is no provision for imposition of a fine in addition to imprisonment, it was not possible to say of the offence charged that it could not be adequately punished by the Magistrate who has power to impose two years' imprisonment. In this view, being of opinion that the commitment was illegal, Buckland J. directed that the commitment be quashed and that the record, with a copy of his judgment, be returned to the Chief Presidency Magistrate in order that he might deal with the complaint according to law. The accused persons had an opportunity before Buckland J., of being heard upon the

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question whether the commitment should be quashed, but nothing was urged upon this point on their behalf. When the matter went back to the Magistrate, they filed a petition contending that the order of Buckland J., read as a whole amounted to a discharge of the petitioners. The Magistrate thereupon has acted under section 432 of the Code of Criminal Procedure with a view to obtaining a decision upon certain questions of law which he has indicated.

Section 432 provides that a Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him; and section 433 provides that when a question has been so referred the High Court shall pass such order thereon as it thinks fit and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order. It will be observed that while the power of the Magistrate is to refer any question of law, the power of the High Court is to pass such order thereon as it thinks fit. In the present case the Magistrate has formally stated seven questions—

(i) What is the correct interpretation of section 215 of the Code of Criminal Procedure?

(ii) Does it give power to the Judge presiding at the Sessions to quash a commitment made to him by a competent Magistrate?

(iii) Does it refer to a power of the High Court in its Revisional Jurisdiction?

(iv) Does it refer to both of these powers?

(v) If it gives the power referred to in (iv), what is the effect when the Judge so presiding quashes a commitment? Has it, as suggested by the accused in their petition, the effect of a discharge, so that the Committing Magistrate has no further jurisdiction in the matter, in the absence of a fresh complaint; or can the Magistrate proceed with the case as it stood prior to his passing the order of commitment?

(vi) Subsidiary to the question raised in (v) is the question whether the Judge presiding at the Sessions has power to direct what shall be the effect of his order quashing the commitment.

(vii) The learned Judge in the present case has quashed the commitment on a point of law, viz., that the charge in the case under section 103 of the Presidency Towns Insolvency Act is punishable with a maximum imprisonment of 2 years; that this being not more than the maximum punishment the Magistrate could award, his order of commitment was illegal. Is the Magistrate bound

by that order, so that in due course when the matter comes on again, he must not commit the case, though with all respect, he differs from the view of the law thereby expressed, and is of opinion that he has power to commit the case?"

Upon the reference coming before a Division Bench, the learned Judges have intimated their opinion and have referred two questions to this Full Bench for determination. Their opinion in substance is that Buckland J., had no power to quash the commitment; that the ground upon which he decided to quash it was erroneous and that if he acted under section 215 of the Code of Criminal Procedure, the accused should stand discharged. The two questions which they have referred to us are as follows:—

(1) Has a Judge presiding over the Sessions of the High Court power under section 215 of the Code of Criminal Procedure to quash a commitment made to him by a competent Magistrate?

(2) Where in a case triable by a Magistrate and not exclusively triable by a Court of Session the Magistrate commits to the Court of Session being of opinion that it should be tried by that Court without saying that he could not award adequate punishment or the case is such where maximum punishment is within the competency of the Magistrate, is the commitment without jurisdiction?

Now, it appears to me that the power of reference conferred upon the Presidency Magistrate by section 432 of the Code is confined to questions of law which the Magistrate requires to decide in order to perform his duty in disposing of the case before him; and that the Magistrate ought not to refer to this Court questions of law unless they are matters upon which he has a duty to make up his mind. In substance the Chief Presidency Magistrate has in this case asked this Court to express its opinion upon three questions—

(1) Whether the learned Judge at Sessions had power to quash the commitment;

(2) whether he was right in law in quashing the commitment for the reasons given by him; and

(3) whether it is competent for the Magistrate to proceed in the absence of a fresh complaint or whether he can proceed with the case as it stood prior to his passing the order of commitment.

I have some difficulty in seeing that either of the first two questions is a question which arises in the hearing of the case pending before the Magistrate. I should have thought that for the purposes of this case the Magistrate had amply discharged his duty if he had taken the order of the High Court as an effective order quashing the commitment and had proceeded to deal with this case

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upon the footing that it was for him to deal with it himself as a warrant case under the provisions of Chapter XXI of the Code of Criminal Procedure.

Assuming, however, that the first question which has embarrassed the Magistrate is the question whether it is open to him to ignore the order of the learned Judge and to treat it as null and void, I am of opinion that the answer to this question is in the negative.

Prior to Act XIII of 1865 which abolished Grand Juries in the Presidency towns, Original Criminal Jurisdiction of the High Court over an individual accused was based upon the presentment of the Grand Jury. Act XVIII of 1862 contained elaborate provisions for the amendment of indictments and provided that every verdict and judgment should be of the same force and effect in all respects as if the indictment had originally been in the amended form. It contained also various provisions according to which an offence might be dealt with, tried and punished by the Supreme Court according as the offence had been either commenced or completed, or as the consequence had ensued, within the local jurisdiction of the Court. It gave jurisdiction in the case of offences committed on a journey or on a voyage in British India. It provided that every objection to an indictment for uncertainty or for any formal defect apparent on the face thereof should be taken by demurrer or motion to quash such indictment before the Jury had been sworn and not afterwards. It defined the word "indictment" to include information, inquisition or presentment as well as indictment; and also plea application or other pleading.

Act XIII of 1865 provided that any Magistrate who shall commit to custody or hold to bail any person for trial before the High Court for an offence committed, or which according to law may be dealt with as having been committed, within the local limits of its Ordinary Original Civil Jurisdiction, should deliver to the Clerk of the Crown a written instrument of charge signed by him stating for what offence such person is so committed or held to bail. It empowered the Clerk of the Crown to alter, amend or add to the charge and directed that the charge, with such amendments, alterations or additions, if any, should be recorded in the High Court. Section 6 enacted that upon the charge being recorded as aforesaid, the persons committed to custody or held to bail shall be deemed to have been brought before the High Court in due course of law and should be arraigned at suit of the Crown and the verdict recorded thereupon. Under this Act it is evident that the founda-



tion of the jurisdiction of the High Court was the written instrument of charge signed by the Magistrate and delivered by him to the Clerk of the Crown. It was only after charges so made had been recorded that the accused were to be deemed to have been brought before the High Court in due course of law.

Between 1865 and the enactment of the Criminal Procedure Code of 1872 the effect of these provisions of the Act of 1865 was considered in *Queen v. Thompson* (1). The accused was tried for an offence committed on board a British ship on the high seas. The written instrument of charge in that case had in fact been made by a Magistrate but the fact did not appear from the instrument itself. Peacock C. J., made it clear that if in fact it had not been preferred by a Justice of the Peace it could not have been supported. But with reference to the provisions which I have already cited from Act XVIII of 1862, he held that "although we do not see on the face of the record that the charge has been preferred by a Justice of the Peace, we know that it was so preferred and that the Judge presiding at the trial would not have quashed the charge for the defect now relied upon but would have caused the charge to be amended." He refers to section 41 of Act XVIII of 1862 and to section 7 of Act XIII of 1865 which provided that in the former Act the word "indictment" should be understood to include the word "charge" and that all the provisions of the said Act should apply to charges recorded as aforesaid and the trial of such charges. It is clear, therefore both on authority and on the terms of the Statutes themselves, as well as upon principle that after 1865 the power of the Court to quash an indictment had become a power to quash the charge comprised in the written instrument of charge delivered by a Justice of the Peace to the Clerk of the Crown.

The written instrument of charge, or as it is now called the order of commitment, has from 1865 onwards a double aspect: It is in the first place an order of the Magistrate; it is in the second place the foundation of the jurisdiction of the superior Court. It may be regarded in either of these ways and it may have to be dealt with under either aspect.

This was the position when the Legislature passed the Criminal Procedure Code of 1872 which purported to be "an Act for regulating the procedure of the Courts of Criminal Judicature, other than the High Courts in Presidency towns in the exercise of their original criminal jurisdiction." Chapter XV of that Code dealt with

(1) (1867) 1 B. L. R. 1. (O. S. Cr.).

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the procedure to be adopted in enquiries before Magistrates in cases triable by Courts of Sessions or High Courts. Section 196 provided that when evidence has been given before a Magistrate which appears to justify him in sending the accused person to take his trial for an offence which is triable exclusively by the Court of Session or High Court, or which in the opinion of the Magistrate is one which ought to be tried by such Court, the accused person shall be sent for trial by such Magistrate before the Court of Sessions or High Court as the case may be. Section 197 was as follows:—

“If such accused person (not being a European British subject) is accused of having committed an offence conjointly with a European British subject who is about to be committed for trial, or to be tried, before the High Court on a similar charge and the evidence appears to justify the Magistrate in sending the accused person for trial, he shall commit such accused person to take his trial before such High Court, and not before a Court of Session; and such High Court shall have jurisdiction to try such person.

*Explanation.*—A commitment once made by a competent Magistrate can be quashed by the High Court only, and only on a point of law. This explanation applies also to section one hundred and ninety-six.”

It may well be that in this Code, as in the subsequent Codes, the definition of “High Court” (which is the same as that now appearing in section 4 of the Code of 1898) is one that does not always fit in with the meaning of the words as used. This is no great matter in the Code of 1872 as section 4 of the Act qualifies the definition therein contained by the phrase “unless a different intention appears from the context.” Remembering, however, that it was no part of the purpose of the Act of 1872 to regulate the procedure of High Courts in the exercise of their Original Criminal Jurisdiction, we will find it impossible to suppose that an “explanation” appended to section 197 of this Code which itself speaks of “trial before the High Court” was intended to alter the law under which a High Court Judge at Sessions had the right and the duty to quash the charge if the prisoner had not been brought before him in due course of law. In the Code of 1882 this explanation reappears as section 215. In that Code the old definition of “High Court” is still applicable to Chapter XVIII. Section 215 reappears in the Code of 1898 in which Code the definition applicable to Chapter XVIII is the definition in section 266.

In my judgment the question is put upon a wrong footing if it be asked in the form whether the power conferred by section 215 is conferred upon the Judge exercising the Ordinary Original Criminal Jurisdiction. To begin with the internal arrangements of the High Court are dealt with by its Rules and the Code does not decide what functions can be exercised by a single Judge or must be exercised by a Division Bench. It deals with the High Court as one and the definitions of High Court are not intended to do more than to point to the Court itself so as to distinguish it from other Courts. In the second place section 215 is a negative or restrictive section. It is intended to negative the existence in Sessions Courts of power to quash a commitment and it is intended to restrict the High Court to cases in which it can be said that the commitment is bad in law. This last restriction is a restriction put upon all powers which the High Court might otherwise possess. I have no doubt at all that it is a restriction which attaches to the powers of the High Court in revision. Indeed as a Court of trial there could be no question of the High Court quashing a commitment on the ground that the evidence would not support the charge. But it is a very different matter to contend that it takes away by implication any other power to quash a commitment for illegality which the High Court may have had. If a Judge of the High Court trying a prisoner discovers that the accused or the offence is, for any reason, outside the jurisdiction of the Committing Magistrate or that the accused has been brought before him by an illegal order of an inferior Court, it is clearly his duty to take some action upon these considerations. His concern with section 215 is, in my judgment, only this: that he is bound to see that he does nothing which the section prohibits.

The question of what he has to do takes us first to section 532 of the Code. This section, it is to be observed, is one of a series which give power to remedy defects of procedure, which otherwise might result in criminal proceedings being set aside for errors not productive of injustice. Section 532 in my opinion is directed to the case of commitments that are bad by reason of a defect personal to the Committing Officer. It envisages a Magistrate purporting to exercise powers duly conferred upon him and this in my judgment is a reference to section 206. The case supposed is one in which everything that has been done has been regular but the person who has committed the accused for trial is not empowered so to do. In these circumstances section 532 provides that, if the

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Court of Session or High Court considers that the accused has not been injured by the irregularity, it may accept the commitment, provided however objection had not been made to the jurisdiction of the Magistrate before the order of commitment was made. This section in my opinion has no reference to a case in which a Magistrate who has general powers to commit an accused person to the High Court commits an accused over whom he has no jurisdiction or commits him for an offence which, upon a true construction of the Code, is not triable by a Court of Session or High Court. Section 53a has in my judgment, no application to the present case but it does remind us that an order of commitment has a double aspect, being at once an order of the Committing Court and an order which is the foundation of the jurisdiction of the higher Court. For the limited purposes of the section the Court of Session as well as the High Court has to make up its mind whether to accept a commitment or to quash a commitment. The section is a curing or remedial section and it must be strictly interpreted in the interests of accused persons. It is idle to argue from the provisions of this section that it assumes or implies that the High Court at a trial has no other authority to quash a commitment.

The next section to be considered is section 273. This is a special power given to High Courts. If it appears to the High Court at any time before the commencement of the trial "that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect" and "such entry shall have the effect of staying proceedings upon the charge or portion of the charge as the case may be." In my judgment this section has no reference to cases of illegal commitment. The reference to portions of a charge and to the charge or portion thereof being clearly unsustainable is sufficient to show that the section is intended to provide a short and effective way by which charges which have no merits may be disposed of.

The prohibition in section 215 by which the High Court is limited to a point of law as a reason for quashing a commitment has in my opinion a plain purpose. In *Chares Chunder Mullick's* case (1) the Court refused an application under section 147 of the High Courts Criminal Procedure Act (X of 1875) finding that the object of the application was to get an order quashing a commitment on the ground that there was an insufficient case upon the evidence. The Judges pointed out that if a commitment may be

(1) (1882) L. L. R. 9 Calc. 397.

quashed upon the merits and application to this effect may be made, it would in practice be made only in doubtful cases. If such an application were entertained and refused the result would be that a prisoner committed upon evidence sufficiently weak to make the result of a trial doubtful would come to his trial prejudiced by the opinion of the High Court pronounced against him to the effect that the commitment ought not to be quashed. Applications of this character would clearly be objectionable. But section 273 provides suitably for this very class of case. The charge must be "clearly" unsustainable or else the Judge will not take into his own hands the functions of the Jury.

If these sections 532 and 273 are not addressed to a case in which the High Court as a Court of trial has before it a prisoner whose commitment is contrary to law in the sense that he is not amenable to the jurisdiction of the Court at all, it would seem that there is no express provision in the Code to direct the Judge's action. The Sessions Judge has a power of reference to the High Court. Is the High Court Judge left in such a case to some irregular or informal arrangement by which he may call in aid a different jurisdiction of the Court—the revisional jurisdiction over the Committing Magistrate? Or is he to say to the prisoner "You have made a very good plea in bar but I cannot listen to it. I will try you though I see I have no right to try you but I will let you take your objection on the general issue"? One may well hesitate to impute either intention to the legislature.

As it appears to me to be clear that prior to the Code of 1882 at all events, the right and duty of the High Court at Sessions to quash a charge is plain, I am of opinion that before it could be held that the Judge in the exercise of the Original Criminal Jurisdiction of this High Court is unable to quash a commitment, it must be shown from the language of the Code or from the scheme of the Code that the legislature has taken away this power *prima facie* incident to any superior Court receiving commitments from lower Courts as the basis of its own jurisdiction. In my opinion no construction that could properly be placed upon section 215 of the Code could be put so high. The legislature in this matter has, I think, been somewhat wiser than has been supposed. It has been content, in view of the revisional powers of the High Court, to take away the power of quashing a commitment, save under section 532, from Courts of Session on which formal powers of reference have been conferred, and to leave the powers of the High Court upon this matter unaffected by special provision save that commitments

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are not to be quashed except upon a point of law. The Code of 1882 intends no more than the Code of 1872 intended. It was unnecessary for the purpose of the legislature in any of the Codes and it was no part of its scheme, to analyse High Courts as though they were a complex of jurisdictions or to set forth the different ways and occasions which might present the question of quashing a commitment for the consideration of High Courts.

In the present case the High Court has in fact quashed the commitment and I think in answer to this reference the Chief Presidency Magistrate may be informed that it is his duty to treat that order as a valid and subsisting order.

The next question raised by the Magistrate is whether the order of Buckland J. has the effect of a discharge so that the Magistrate has no further jurisdiction in the matter in the absence of a fresh complaint, or whether the Magistrate can proceed with it as it stood prior to the passing of the order of commitment. To this question I would reply that while the primary effect of the order quashing the commitment is to supersede any action taken by the Magistrate under section 220 and his proceedings subsequent thereto, it is necessary for the Magistrate in this case to go back to the point at which he took cognizance of the complaint. There is no need whatever for a fresh complaint, but it is necessary for the Magistrate to treat the case as a warrant case and not as a subject matter of an enquiry under Chapter XVIII. The Magistrate must begin the trial afresh under section 252.

The last question raised by the Magistrate concerns the merits of the order of Buckland J. and raises the question whether the learned Judge was right in holding that it is illegal for a Magistrate to commit the accused to trial when the offence is neither exclusively triable on commitment nor one of which it is possible to hold that the Magistrate has insufficient power to inflict adequate punishment.

That the Magistrate should think fit to raise this question is presumably to be explained by the circumstance that he entertains a doubt whether or not the order of the learned Judge was without jurisdiction. That doubt having been resolved, it is not to be supposed that the Magistrate will entertain a suggestion that when he rehears the case, he should again commit the accused to the High Court Sessions. Such a procedure would in this case be in the highest degree disorderly. The question whether it is lawful for the Magistrate to commit this case to the High Court Sessions has been decided by this Court once. This Full Bench is not

sitting on appeal from the order of the learned Judge. Whatever be the difficulties in the question raised and whatever be the answer, there is only one order which could in this case be correct and I am of opinion that it is open to us on this reference to direct the Chief Presidency Magistrate to proceed with the case as a warrant case and to try it as such in conformity with the decision which has already been given in the presence of the accused.

This reference to the Full Bench has been made under Rule 5 of Chapter VII of the Rules of the Appellate Side. Under this rule the whole case is referred to the Full Bench for such orders as to the Full Bench may seem fit. The order which I would propose is as follows :—

1. Declare that the order of Buckland J., is a valid and subsisting order.
2. Direct the Chief Presidency Magistrate to try the accused under Chapter XXI of the Criminal Procedure Code upon the basis of the complaint already made.
3. Direct the Magistrate that he is not again to commit this case for trial at the High Court Sessions.
4. Save as aforesaid, this Court does not think fit to make any further order upon this reference.

C. C. Ghose, J : I agree.

Buckland, J : I agree.

B. B. Ghose, J : I agree.

Mukerji, J : I agree.

A. T. M. *Case to be tried by the Chief Presidency Magistrate.*

## APPELLATE CRIMINAL

*Before Mr. Justice Cuming, and Mr. Justice Lord-Williams.*

BIKRAM ALI PRAMANIK AND OTHERS

v.

EMPEROR\*

*Misdirection—Combining offences under sections 395 and 457, Indian Penal Code, (Act XLV of 1860)—Question put by public prosecutor, which the accused should have put—Evidence Act (I of 1872), Secs. 143, 154—Hostile witness—English law—Using confession of co-accused against other accused.*

*Per Curiam :* Offence under section 454 Indian Penal Code is in some cases

\* Criminal Appeal No. 58 of 1929, against the decision of B. C. Chatterjee Esq., Assistant Sessions Judge of Pabna, dated the 17th January, 1929.

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a minor offence to offence under section 395. Hence alternative charges under sections 395 and 457 Indian Penal Code are not bad in law.

When it was clear from the charge that the Judge did not tell the jury that the statement of A that he himself B, C and two others were the persons who had committed the dacoity could only be used against A and therefore apparently allowed it to be used against the accused, but he entirely neglected to draw the attention of the jury to the way in which this evidence was extracted from the witness—the witness first of all made no mention whatever of the fact that A had made a statement to him in which he said that he B, C and two others had committed dacoity, and it was only in answer to the leading question by the public prosecutor which practically put into the witness's mouth the answer which he wanted that the witness stated that A had told him that he B, C and two others had committed the dacoity; neither did he give any direction to the jury as to how they should treat and the weight they should give to the evidence of an accused person as against his co-accused:

*Held*, that the omission of the Judge to bring this fact to the notice of the jury seriously prejudiced the accused person.

*Per Cuming, J*: When the public prosecutor asked the permission of the Court to put questions to a witness which might be put by the adverse party, he did not intend to declare the witness hostile and to cross-examine him.

Section 154 read with section 143 of the Evidence Act provides that the Court may allow the party to put leading questions to his own witnesses. But that does not necessarily mean that he must declare the witness hostile and cross-examine him. It is only when he declares the witness hostile and cross-examines him that he cannot rely on his evidence.

*Per Lord Williams, J*: Sections 143 and 154 of the Evidence Act read together do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the Judge. Under section 154, the party may, with the permission of the Court, treat a witness as hostile and cross-examine him. The legislature did not intend to distinguish the law in this country from that obtaining in England.

Appeal by the accused under section 410 of the Code of Criminal Procedure.

The accused were convicted under section 457 Indian Penal Code and each sentenced to undergo rigorous imprisonment for 2 years.

The material facts appear from the judgment.

*Mr. Dinash Chandra Ray* for the Appellants.

*Mr. Debendra Narain Bhattacharjee* for the Crown.

The judgments of the Court were as follows:—

*Cuming, J*:—This is an appeal by two persons Bikram Ali Pramanik and Kudrutulla Khan. These two persons together with one Samatulla were tried by the learned Additional Sessions Judge

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of Pabna and a jury on charges of dacoity and house breaking by night. The jury unanimously found all the three persons guilty under section 457 Indian Penal Code and not guilty under section 395 Indian Penal Code. The appeal of Samatulla has been summarily dismissed and that of the other two appellants is now before us.

The case for the prosecution briefly was that these persons together with a number of other persons broke into the house of the complainant on the night of the 27th May 1928. The defence briefly was a denial of the whole occurrence; and there was a suggestion in the case of Samatulla of enmity.

The first point raised by the learned vakil for the appellants is that the alternative charges under sections 395 and 457 Indian Penal Code are bad in law. Why it is bad in law I am unable to understand. Offence under section 457 Indian Penal Code is really in some cases a minor offence to offence under section 395. There can be no reason why there should not be alternative charges of these two offences.

The next point raised is that the learned Judge has not properly dealt with or has misdirected the jury with regard to a certain alleged confession. It is alleged that Samatulla whose appeal has been rejected on the night of the dacoity made a confession to a cousin of his one Ketab Ali Sarkar in which he admitted that he and the two appellants had committed dacoity in the house of the complainant. In dealing with this confession the learned Judge's charge to the jury is as follows "P. W. 15 Ketab Ali, a deed writer in the Salanga Registration Office says that the accused Samatulla is his cousin and that he went to him at about 3-30 A. M. on the night of occurrence and requested him to save him as his name had been mentioned in connection with the dacoity. This person says that after pressure being put, the accused Samatulla stated that he with the other two accused and also two other persons had committed the dacoity. The witness admits that there was a quarrel between him and the accused Samatulla regarding the deduction of Rs. 10 from the price of 3 maunds of sweetmeats taken by Samat from his shop. This witness further admits that he (Samat) also said that his name had been falsely mentioned in the Ejahar at the Thana. P. W. 15 was not examined by the Sub-Inspector. It is for you to say whether the accused Samatulla went to this witness on the night of occurrence and made the confession". With regard to the alleged confession itself it is to be found in the evidence of Ketab Ali Sarkar when examined before the Magistrate. There he

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stated that Samatulla on being pressed said that he, Bikram Ali, Kudrat Ali Khan and two others committed dacoity in the house of Chandulla Sarkar. When examined in the Sessions Court he states as follows. "Accused Samatulla is my co-villager. At about 3 and 3-30 A. M. the Nanigachi mela day I came to know of a dacoity in Chandulla's house....Accused Samatulla went to me that night. He is here. He said that his name had been taken in connection with the dacoity in Chandulla's house. He asked me to go to the Prodhans of that Parah. I told him to come in the morning as I could not go at that hour of the night. He did not come to me any more. He said that three names were mentioned in connection with the dacoity, viz., those of Bikram and himself and the man who was a Hindu before and converted to be a Mahomedan afterwards." It would be noticed that in that statement Samatulla does not say that he and the other two appellants committed the dacoity. He only says that three names had been mentioned. The public prosecutor was evidently not satisfied with that statement; for he asked the permission of the Court to put further questions to the witness and he then asked as follows. "Did Samatulla tell you that he and Bikram and Kudratulla and two others had committed dacoity in the house of Chandulla Sarkar." The answer was "yes, he said so." Mr. Roy who appears for the appellants contends that the public prosecutor having declared the witness hostile and cross-examined him it was not open to the prosecution to rely upon the evidence of this witness. The only effect of declaring the witness hostile and cross-examining him was to discredit the witness altogether. But it does not appear that the prosecution wished to cross-examine the witness for the purpose of discrediting his evidence. As far as can be seen what the public prosecutor did was to ask the permission of the Court to put questions to this witness which might be put by the adverse party. From this it cannot be said that he intended to declare the witness hostile and to cross-examine him. Section 154 read with section 143 of the Evidence Act provides that the Court may allow the party to put leading questions to his own witnesses. But that I do not think necessarily means that he must declare the witness hostile and cross-examine him. It is only when he declares the witness hostile and cross-examines him that he cannot rely on his evidence. It will be seen from a perusal of the evidence that what the public prosecutor desired to get from the witness was not a contradiction of what he had said but something in addition. It was not cross-examining his own witness but with the permission of the Court was asking

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him leading questions. That is not necessarily to cross-examine. This is clear from section 154 itself which does not say that a person who calls a witness may cross-examine him in certain circumstances but that he might put question to him which might be put in cross-examination by the adverse party. That is not the same as cross-examining him. If it were the Code would have said so.

Be that as it may it has further been argued by Mr. Roy that the Judge has entirely failed to direct the jury as to how they should deal with the evidence of a co-accused. Here Mr. Roy said on former ground. As far as can be seen from the charge of the learned Judge he gave no direction whatever to the jury on this point. It is clear from his charge that he did not tell the jury that the statement of Samatulla that he himself Bikram, Kudar Ali and two others were the persons who had committed the dacoity could only be used against Samatulla and therefore apparently has allowed it to be used, as in certain circumstances it can be used, against the co-accused, but he entirely neglected to draw the attention of the jury to a very important matter, namely, the way in which this evidence was extracted from the witness. The witness first of all made no mention whatever of the fact that Samatulla had made a statement to him in which he said that he Bikram, Kudar Ali and two other persons had committed dacoity; and it is only in answer to the leading question by the public prosecutor which practically put into the witness's mouth the answer which he wanted that the witness stated that Samatulla had told him that he Bikram, Kudar Ali and two others had committed the dacoity. Neither does he give any direction to the jury as to how they should treat and the weight they should give to the evidence of an accused person as against his co-accused. It is impossible for us to say that the omission of the Judge to bring this fact to the notice of the jury has not seriously prejudiced the two accused persons.

In these circumstances we must set aside the verdict of the jury and direct that the appellants be retried.

**Lort-Williams, J.:**—I agree with my learned brother that this conviction should be set aside and the two appellants retried.

I desire to add that in my opinion sections 143 and 154 of the Evidence Act read together do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the Judge.

The meaning of section 154 is that they may, with the permission of this Court, treat a witness as hostile and cross-examine him.

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The wording of section 154, shows that the legislature did not intend to distinguish the law in this country from the law which obtains in England.

A. T. M.

*Retrial ordered.*

## CRIMINAL REVISION.

*Before Mr. Justice Sukrawardy, and Mr. Justice Jack.*

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JNANADA CHARAN GHATAK

a/k/a

JNANENDRA (JNAN) CHANDRA GHATAK

v.

EMPEROR\*

*Prejudice—Charge framed for substantive offence—Conviction for abetment—No order for conviction under Sec. 120B, Indian Penal Code (Act XLV of 1860)—Criminal Procedure Code (Act V of 1898), Sec. 237.*

*Per Sukrawardy, J.:* It cannot be definitely said that a person having been charged with a substantive offence cannot be convicted for abetment thereof. Every case depends upon its own fact and if the facts justify the conviction for abetment, though the person was charged with the commission of the offence itself, there is no bar in law to such conviction; *Reg v. Chand Nwar* (1); *Indar Chand v. Emperor* (2) and other cases followed. *Hulas v. Emperor* (3) doubted.

*Per Jack, J.:* Whether a man can be convicted without a separate charge on a charge of abetment of the principal offence depends upon the circumstances of the case. But it can only be done if the circumstances being the case under section 237 of the Code of Criminal Procedure.

Where a petitioner was charged under section 120B of the Indian Penal Code and was clearly guilty under that section but no conviction was made by the lower Court:

*Held (per Sukrawardy, J.)* that, the High Court could alter the finding and convict the accused.

*Per Jack, J.:* That as the accused was not prejudiced by the procedure adopted, there was no necessity for interference.

\* Criminal Revision No. 131 of 1929, against the order of T. H. Ellis Esq., Sessions Judge of Faridpur, dated the 14th January, 1929, affirming that of Mr. A. Majid, Magistrate, 1st Class, of Madaripur, dated the 18th September, 1928.

(1) (1874) 11 Bom. H. C. R. 240 (2) (1915) I. L. R. 42 Calc. 1094(1133).

(3) (1926) 44 C. L. J. 216.

Application for Revision by the Accused under section 435 of the Code of Criminal Procedure.

The accused was convicted under section 420 read with section 114 Indian Penal Code and sentenced to undergo rigorous imprisonment for 3 months.

The material facts appear from the judgment.

*Missrs. Suresh Chandra Talukdar and Amrita Lal Mukerji* for the Petitioner.

*Mr. Nirmal Chandra Chakravarty* for the Crown.

C. A. V.

The following judgments were delivered :

**Suhrawardy, J :—**The only question of law argued before us on behalf of the petitioner is that his conviction for abetment of the substantive offence, though he was not charged with it originally, is erroneous in law. Three persons were tried on a charge under section 420 Indian Penal Code. The petitioner is the third accused and he is said to have taken part in carrying out the purpose of the cheating. They were further charged under section 120 B for conspiracy. The facts are that one Alekjan Bibi was induced to sell her property to the first accused Wazaddi under circumstances which made it a clear case of cheating. She was told that she was to execute a Kobala in favour of some one else for rupees three hundred. As a matter of fact the Kobala was written in favour of Wazuddi to the knowledge of the petitioner and a bundle of money purporting to be rupees three hundred was made over to Alekjan Bibi. It was subsequently found to contain small coins and pice worth Rs. 5. On these facts as elaborated in the evidence the accused were charged under section 120 B and 420 Indian Penal Code. The petitioner was convicted under section 420 read with section 114, Indian Penal Code and sentenced to three months rigorous imprisonment, though there was no charge framed under section 114. It is argued that there being no such charge against the accused he could not be convicted under that section. There is some divergence of opinion on the question as to whether a person having been charged with a substantive offence can be convicted for abetment thereof. It is not necessary to refer to all the various cases that have been cited before us bearing upon this point, for I think the right view of the question raised before us is that it cannot be definitely laid down that a person having been charged with a substantive offence cannot be convicted for abetment thereof. Every case depends upon its own facts and if the facts justify the conviction for abetment, though the person was

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charged with the commission of the offence itself, there is no bar in law to such conviction. The principle is what was laid down long ago in *Reg v. Chand Nur* (1), where it is said that if evidence adduced in support of the charge for the substantive offence does not give notice to the accused of all the facts which would constitute abetment, he cannot be convicted of abetment. This question was considered in the case of *Indar Chand v. Emperor* (2) and Mr. Justice Woodroffe who was the third Judge, to whom the case was referred on account of difference of opinion between two Judges, observed at page 1133: "I am not prepared to hold as a universal rule that in no case can there be a conviction for abetment where the charge is only for the substantive offence." The same view has been expressed in the unreported case of the *King-Emperor v. Kadir alias Abdul Kadir Ali alias Kadir Ali* (3), by C. C. Ghose J. in these words: "It is true that there was no charge of abetment of murder against the present appellant before the jury but in my opinion it cannot be laid down as a universal rule that in no circumstances whatsoever where there is a charge for a substantive offence and there is no charge of abetment of that offence can the person so charged with substantive offence be convicted of abetment of that offence." The same view has been expressed in *Emperor v. Mahabir Prasad* (4) and *Dibakar v. Saktidhar Kabiraj* (5). A great deal of support for this view is to be obtained from the decision of Judicial Committee in *Begu and others v. The King-Emperor* (6) where the accused was charged under section 302 Indian Penal Code but convicted under section 301 Indian Penal Code for destroying the evidence of the commission of that offence. Their Lordships remarked; "A man may be convicted of an offence although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made." I must, therefore, submit with great respect that the view taken in *Hulas Chand Baid v. Emperor* (7), by one of the Judges and adopted by the other Judge and couched in general language is not supported by authority. There are some cases which have held to the contrary but which seem to have proceeded only upon the reading of section 238 Criminal Procedure Code and make no

(1) (1874) 11 B. H. C.-R. 240.

(2) (1915) I. L. R. 42 Calc. 1094.

(3) Unreported—Reference No. 2 of 1928 under section 374 Criminal Procedure Code and Appeal No. 2 of 1928.

(4) (1926) I. L. R. 49 All. 120.

(5) (1927) 31 C. W. N. 527.

(6) (1925) L. R. 52 I. A. 191; 41 C. L. J. 437. (7) (1926) 44 C. L. J. 216.

reference to the other relevant section 237 : *Padmanabha v. Emperor* (1) and *Emperor v. Raghya Nagya* (2).

We have next to consider as to whether in the words of the Judicial Committee there is evidence such as to establish the charge of abetment and whether the accused has, by the absence of the charge of that offence, been prejudiced. The fact deposed to in the complainant's evidence and the evidence of her witnesses has been found by the Judge to be that the petitioner wrote the Kobala in the name of the first accused ; and the circumstances under which the money was actually made over to Alekjan show that the petitioner was a party to the cheating. He brought the receipt from the Sub-Registrar's office and made it over to the first accused. It was further proved that the petitioner was to make over the money to the complainant but he refused to do so as there was a danger if the bundle was opened before the Sub-Registrar. These facts sufficiently prove that the petitioner was privy to the commission of the substantive offence by the first accused. Upon these facts the petitioner's conviction was based and he had full notice that he had to meet these allegations in his defence.

The petitioner was further charged under section 120B. But it appears that no order was passed under that section by any of the Courts below. We have therefore ample authority under section 423 Criminal Procedure Code to alter the finding and convict the accused under section 120B on the finding of fact arrived at by the learned Sessions Judge who says "it is clear that if Waziuddi was to carry through his plot successfully he would need the help of some one to write the deed. The circumstances under which the deed was written and in particular the circumstances under which the money was actually made over show that Gnanendra must have been a privy to the plan." In any view of the case the accused has been rightly convicted and sentenced.

The Rule is, therefore, discharged. The petitioner's bail bond should be cancelled. He must serve out the remainder of the sentence.

Jack, J. :—I agree. I would only like to add that in my opinion whether a man can be convicted without a separate charge on a charge of abetment of the principal offence depends upon the circumstances of the case. But it can only be done when the circumstances bring the case under section 237 Criminal Procedure Code. In the present case I think the circumstances are such as to bring the case under section 237 and I think the Court was justifi-

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(1) (1909) 1 L. R. 33 Mad. 264.

(2) (1924) 26 Bom L. R. 323.

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fied in convicting the accused inasmuch as the absence of a separate charge was not likely to prejudice the petitioner. I think, however, that in this particular case the trial Court should have convicted the accused under section 120 B, Indian Penal Code. The learned Judge finds that there is no direct evidence to sustain the charge under section 120 B against the four accused persons. It is not easy to understand what he means by this inasmuch as the evidence on which he convicted the petitioner under section 420/114 was in itself sufficient to convict him on the charge under section 120 B. On the findings arrived at by both the Courts below the petitioner was clearly guilty under section 120 B and he ought to have been convicted under that section. But inasmuch as the appellant has not been prejudiced by the procedure adopted it is not necessary for us to interfere.

A. T. M.

*Rule discharged.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Cuming and Mr. Justice Lort-Williams.*NATABAR HALDAR (*alias*) NATAK

v.

EMPEROR\*

## CRIMINAL.

1929.

July, 29, 3).

*Misdirection—Judge's charge—Bare statement—Penal Code (Act XLV of 1860),  
Secs. 302, 304 Parts I and II.*

The spirit of the Code of Criminal Procedure demands that there shall be more than a bare statement of facts in the Judge's charge. Otherwise he can be of little assistance to the jury.

Where the Judge simply detailed chronologically the evidence given by the witnesses for the prosecution without sifting or analysing it and without directing the jury in any way upon the value or weight which ought to be or might be attached to it, he failed to give that help to the jury which he ought to have given.

The Judge after explaining sections 302 and 304 Indian Penal Code said to the jury in his charge "If, however, you find he had neither the intention nor the knowledge requisite under section 302 consider his liability under section 304 Indian Penal Code." He then read and explained that section and continued "If you hold that he intended to cause K such bodily injury that death would be

\*Criminal Appeal No. 107 of 1929, against the decision of J. Younge, Sessions Judge of Bakarganj, dated the 14th December, 1928.



a possible but not the most probable result you will find him guilty under section 304 Part I or if you hold that he had no such intention but knew as a reasonable man that K's death would be a likely consequence of his act you will find him guilty under section 304 Part II";

*Held*, that the direction was wrong.

Appeal by the accused under section 410 of the Code of Criminal Procedure.

The accused was convicted under section 304, Part I, Indian Penal Code and sentenced to transportation for life.

The material facts appear from the judgment.

*Messrs. Suresh Chandra Talukdar and Bhupendra Nath Dutt* Roy for the Appellant.

*Mr. Anil Chandra Roy Chowdhury* for the Crown.

The following judgments were delivered :—

**Lort-Williams, J** :—The accused Natabar Haldar *alias* Natak was tried before the learned Sessions Judge at Barisal with a jury under section 302 Indian Penal Code for causing the death of one Karim Shah. Along with the accused his brother Nandabashi was also tried under section 302 read with section 114 Indian Penal Code for abetting him. He was acquitted. The case of the prosecution was that the two accused brothers, Nandabashi and Natabar, lived together and were tenants of Abdul Kader Talukdar of Chatra. Narendra Nath Bose was the landlord's Tehsildar and Karim Shah was his Mridha. In the afternoon of Tuesday the 27th March 1928 Narendra (with Karim) had gone to the Bari of the two brothers where he found them and also Mahommed Shah and Abdul Karim Bari.

There was some conversation and Narendra demanded the rent due from the brothers. Nandabasi said that they were unable to pay them and the Teh sildar and Karim were about to depart when Nandabasi invited them to the inner hut at the north Viti of the Bari to say something to them. Thereupon they went to the north Viti hut, Natabar also accompanying them and there they sat down. An altercation then arose between the two brothers and Karim Shah with regard to a Jaisudi Bari which apparently the latter had taken possession of, but the possession of which was claimed by the brothers. They complained that he did not pay any rent for this Bari. His answer was that various people held mortgages on the property and he did not know to whom to pay the rent. When the altercation had been going on for about 20

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minutes, Natabar who had gone inside the hut suddenly appeared with a Leja and speared Karim as he sat on the Verandah. He attempted to get up and Nandabasi then got up and helped Natabar to press the Leja home. Karim rolled over and died within a few minutes. Narendra got up and ran out of the Bari for help. Mohammad Shah who had been left at the Baithak-khana heard his brother Karim cry out and ran to the north Vita hut and saw his brother lying in front of the door of the hut and Natabar standing on the Verandah with a Leja in his hand. He tried to drag the body away but Nandabasi cried to his brother to kill him if he persisted in the attempt. Mohammad then ran away from the Bari. On his way he passed a number of people who had been called as witnesses and he told them all that his brother had been killed by Natabar. Various witnesses came to the Bari and were threatened by Natabar who said that he would kill anybody who came near or tried to take the body away. Some of the witnesses alleged that he had said that he would kill them as he had killed Karim. The wound upon Karim when examined afterwards by the doctor were found to be consistent with having been done with a Leja. The chest was slashed open and the wound perforated the upper lobe of the left lung, the left varticle of the heart in two places and the stomach in two places. It is obvious therefore that considerable force must have been used. Natabar's defence was that he had had a quarrel with a neighbour on account of the neighbour's son interfering with his Panbaroj, that somebody suggested that he should go to his landlord to have the matter decided, and that the landlord instead of helping him had fined him Rs. 25 apparently on three separate occasions making the fine Rs. 75 in all. He also sentenced him to be slapped with a shoe but this part of the sentence was remitted. He says further that in consequence of his inability to pay the fine imposed the landlord had sent his servants for the purpose of collecting the fine and that they with a number of other persons had attacked him when he was attending to his Panbaroj and that he had ran away towards his Bari when a Leja had been thrown at him but missed him. He managed to get into his Bari and when he tried to shut the door another Leja was thrown at him which grazed him on the thigh and in turn he picked up the Leja which had been thrown at him and either threw it back or used it in his defence with the result that, during the fight which ensued, Karim was struck. These shortly are the facts.

The sole witness of actual striking of Karim was Narendra but

Mahommed saw the body almost immediately afterwards, and as I have said certain witnesses deposed that Natabar threatened them that he would kill them as he had killed Karim. It will be observed that a considerable part of the evidence of the persons who say that they saw Mahommed running and heard his news is as consistent with the case for the defence as it is with that of the prosecution. It would fit in with either story. Uday Chandra Roy, prosecution witness No. 11 said in his cross-examination that the men he had seen were running with something like Lathis in their hands and that from within the Basabari he heard Natabar cry out that he was being murdered.

Mr. Talukdar on behalf of the appellant has complained first of all that the learned Judge has not properly put the case of the defence to the jury. He has also raised a point of law with regard to the learned Judge's direction upon section 304 Indian Penal Code. In view of the opinion which we have formed as to the learned Judge's direction in law it is not necessary to deal at length with the first point taken on behalf of the accused. But reading the charge as a whole I am of opinion that it does not sufficiently draw the attention of the jury to the defence raised, nor does it show the importance of the evidence of Uday Roy in his cross-examination. The learned Judge, as so many learned Judges in the Mofussil seem to do, simply detailed chronologically the evidence given by the witnesses for the prosecution without sifting or analysing it and without directing the jury in any way upon the value or weight which ought to be or might be attached to it, and by so doing has really failed to give that help to the jury which he ought to have given. As I have already pointed out in a recent case the spirit of the Code demands that there shall be more than a bare statement of facts in the learned Judge's charge. Otherwise he can be of little assistance to the jury.

The point raised in the learned Judge's direction in law refers to the following passage in his charge. He had explained sections 302 and 304 and eventually said this "If, however, you find he had neither the intention nor the knowledge requisite under section 302 consider his liability under section 304 Indian Penal Code." He then read and explained that section and continued "If you hold that he intended to cause Karim Shah such bodily injury that death would be a possible but not the most probable result you will find him guilty under section 304 part I or if you hold that he had no such intention but knew as a reasonable man that Karim's

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death would be a likely consequence of his act you will find him guilty under section 304 part II." In our opinion this direction would have been quite correct if he had not used the word "possible," but had adhered to the words of the section and had used the word "likely".

It becomes clear, that the Judge's direction is wrong, if you apply it to a concrete instance. I may repeat here the example which I suggested during the discussion—If Natabar had struck a blow with the Leja on Karim's skin it is clear that Karim might have died from septic poisoning arising from the wound. His death would be a possible result of what Natabar had done but not the most possible result. According to the learned Judge's direction such an act would come within section 304 part I. We are clearly of opinion that it would not. It might possibly come within section 304 part II. But it is more than likely that such an act would not come within the purview of section 304 at all. In view of the fact that the jury have convicted the accused of an offence under section 304 part I it cannot be said that this misdirection may not have misled the jury.

In these circumstances we are of opinion that the conviction and sentence must be set aside and the appellant retried.

Cuming, J :—I agree.

A. T. M.

*Retrial ordered.*

## PRIVY COUNCIL

PRESENT : *Lord Carson, Lord Blanesburgh and Sir Lancelot  
Scanderson.*

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v.

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June, 15.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT  
WILLIAM IN BENGAL.]

*Will, construction of—Daughter's estate—Power to alienate—Surrounding  
circumstances—Ekramnama between two sisters curtailing the jus  
accrescendi.*

The circumstances of the testator referred to in his will and surrounding him at its date, are not irrelevant upon the question of construction, as to daughter's claim to a declaration of an absolute interest.

The clause of the Will upon which was rested the appellant's claim to a declaration of an absolute interest was as follows: "After my death my said two daughters shall be my lawful heirs, and they alone shall in equal shares become owners of all my properties subject to the provisions of this Will: the (said) two daughters shall acquire a manner of rights consistent with Hindu Law, in the properties that shall be left by me. God forbid, if my death takes place after the marriage of one daughter and before the marriage of another, then the unmarried daughter shall not be entitled to claim the entire property by virtue of her not being given in marriage, nor shall she get the same; even if such a circumstance should happen, both the daughters shall inherit in equal shares. The daughters and their sons, that is to say my heirs, shall enjoy the properties etc so long as they shall live in this house... Nobody shall ever by fixing the abode at any other place than this be entitled to own or enjoy the property. None shall be competent to succeed to the property who may go to live elsewhere".

Within three months of making his will, the testator died leaving his two daughters, the appellant and her sister, unmarried, surviving. Subsequently the daughters married and had sons, the appellant had one son and her sister, three sons. The sister died on the 15th June, 1914.

On the 17th April, 1909, the sisters executed an Ekramnama which provided "if one of the sisters should die the son or sons of the predeceased should so long as the other sister lives remain owners in possession in the same manner as his or their mother had been of the one half share of the movable and immovable property left her by her father. On the death of the surviving sister the sons of both are to have such right and share as they are entitled to get under the testator's will."

At the date of the Ekramnama, the appellant had one son and the sister had three sons:

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*Held*, that the only interest given by the will to his daughters respectively in the property of the testator was the interest of a daughter as recognised by the Hindu Law. The interest taken by each of the testator's daughter under the will was one which determined with her death.

A power to alienate is an essential incident of an absolute interest in property.

*Held, further*, that the Ekramnama was effective to dispose in favour of the sons of the sister during the life of the appellant of the moiety of the testator's estate appertaining to their deceased mother.

It was contended that the Ekramnama was not binding on the appellant at all, as, it was, in the event which had happened, no more than a grant in favour of the sister's sons, and while still a mere expectancy under the will the appellant, by the operation of the *jus accrescendi* might become entitled on her sister's death in her life time. Their Lordships did not entertain this contention.

Privy Council Appeal No 132 of 1927 by the Plaintiff, against the judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 12th November, 1925, affirming those of the Subordinate Judge of Kishnagar.

The material facts appear from the judgment of their Lordships.

*De Gruyter K. C.* and *Dube* for the Appellant.

*Dunne K. C.* and *Parikh* for the Respondents.

The judgment of their Lordships was delivered by

June, 11.

**Lord Blanesburgh**: Two questions were discussed at the hearing of this appeal. The first was whether the appellant is not entitled under the will of her father to an absolute interest in a moiety of his estate. The second was whether, if under the will the interest taken by her must be limited to that of a Hindu daughter only—as is the contention of the respondents—she is not in the events which have happened, and notwithstanding an ekramnama entered into on the 17th April, 1909, between herself and her sister, since deceased, entitled for the rest of her life to the remaining moiety of their father's estate, bequeathed in the first instance to her sister and now in the enjoyment of the respondents, the sons of that sister.

In the Courts in India further questions were raised by the appellant. These were decided against her and were not again ventilated at their Lordships' Board. There, the only questions discussed were those just stated—the second of them, in the form presented to the Board, being, as it seems, raised for the first time. But of this later.

The circumstances of the appellant's father referred to in his will and surrounding him at its date, are not irrelevant upon the question of construction which the appellant raises in the suit.

The testator, Mathura Mahan Pal by name, was when he made his will, on the 12th October, 1884, an old man. He was, as he put it, in a declining state of physical strength. He had no expectation of any addition to his family. He had been twice married but was a widower. No issue of his first marriage survived. By his second wife he had two daughters, the appellant and Sarat Kumari, her younger sister. Their mother had died in 1881. In 1884 they were both infants and were still unmarried. But the appellant had attained marriageable age, and the testator was, as he expressed it, trying to get her married soon, and had made up his mind after she was married to keep his son-in-law in his family. These matters are detailed by him as an exordium to his will, and, coupled with the provisions expressly confirmatory of that impression contained in the dispositive clause set forth later, indicate that at least one main purpose of his in making a will at all, if not, indeed, his only purpose, was the limited one of protecting the appellant against the danger of being deprived of any interest in his estate should she, alone of his two daughters, be married before his own decease.

That event did not, however, happen. Within three months of making his will the testator was dead. Both of his daughters remained still unmarried. The testator's expectation had not been realised. Subsequently each of the daughters found husbands, whom each in turn survived. The appellant remains a widow with one son. Her sister Sarat Kumari, also a widow, died on the 12th June 1914. The respondents are her three sons.

In her lifetime, the *ekranama* above referred to was entered into between the two sisters. According to the respondents' contention it was effective to dispose in their favour during the life of the appellant of the moiety of the testator's estate appertaining to their deceased mother, and their contention further is that under the testator's will the interest taken whether by the appellant or by their mother Sarat Kumari was the interest of a Hindu daughter only.

To defeat this contention the present suit was launched by the appellant. By her plaint she claimed the alternative relief already indicated. The suit has been dismissed by both Courts

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before which it has come—by the Subordinate Judge of Kishnagar, and on appeal by the High Court of Judicature at Fort William in Bengal. It is from the judgment and decree of that Court dated the 19th November 1925, that the present appeal is brought.

The clause of the will upon which is rested the appellant's claim to a declaration of an absolute interest is, according to the translation favoured by her, as follows:

"After my death my said two daughters shall be my lawful heirs, and they alone shall in equal shares become owners of all my properties subject to the provisions of this Will: the (said) two daughters shall acquire all manner of rights consistent with Hindu Law, in the properties that shall be left by me. God forbid, if my death takes place after the marriage of one daughter and before the marriage of another, then the unmarried daughter shall not be entitled to claim the entire property by virtue of her not being given in marriage, nor shall she get the same; even if such a circumstance should happen, both the daughters shall inherit in equal shares. The daughters and their sons, that is to say my heirs, shall enjoy the properties etc., so long as they shall live in this house at Boalmari. Nobody shall ever by fixing the abode at any other place than this be entitled to own or enjoy the property. None shall be competent to succeed to the property who may go to live elsewhere. Nobody shall at any time be competent to remove the Sadar Cutchery at Balidanga to any other place, the Sadar Cutchery shall always remain there. Such is the injunction also from my ancestors."

Now in order to reach a final conclusion as to the true effect of this clause it should of course be read in its context already referred to, and in association also with one or two further provisions of the will to which reference must later on be made. But even by itself and in the translation favoured by the appellant their Lordships are of the opinion that the only interest thereby given to his daughters respectively in the property of the testator is the interest of a daughter as recognised by the Hindu Law. Their ownership is to be ownership which in relation to daughters is consistent with that law. Even more clearly does this conclusion emerge if reference be had to the translation of the clause made by the Court translator and included in the paper book under the Registrar's order. Its introductory words as so translated, are as follows:

"On my death these two daughters of mine are my heirs



according to the Shastras. It is they who shall be entitled to all my properties in equal shares under the provisions of this Will. The two daughters shall get such rights as are enjoined by the Hindu Shastras to the properties (to be) left by me."

So much, even on a general perusal of the words. But if the clause be more critically examined and if it be read, as already indicated it should be, in connection with other relevant provisions of the will, the conclusion that the interest taken by each of the testator's daughters thereunder is one which determines with her death becomes irresistible.

It will, first of all, be noted that in the clause itself not the daughters only, but these daughters and their sons—the latter, of course, not then in being—are referred to as the testator's "heirs," and in other clauses of the will, notably in clauses 3, 5 and 6, that word is used in the same comprehensive sense.

Notable again, as if by way of contrast, is the manner in which the testator when referring in terms only to his daughters fetters their powers over the property. Clause 7 provides that if either of the daughters, elder or younger, desires to have a partition of the property effected she shall not be competent to do so. Clause 8 again is a striking confirmation of the conclusion that the interest conferred by clause 2 is a limited one only.

"When the daughters shall attain majority, the Executors shall make over to their satisfaction the properties, etc., and everything, if they decline to accept the properties, etc., into their own hands as being incapable, the Executors shall when the daughters' sons attain majority, retire after making over everything to them to their satisfaction."

Again a power to alienate is an essential incident of an absolute interest in property. And not only is no such power in terms conferred upon the daughters, but the prohibition against partition by them and the provision of clause 8 for the benefit of their sons indicate clearly, as their Lordships think, that the whole scheme of the will—as might have been expected from its exordium—is that the property shall remain intact after the death of both daughters for the benefit of their sons as the heirs of the testator. Accordingly the Board, in agreement with both Courts in India, is of opinion that the appellant is not entitled to the declaration of absolute ownership which she seeks.

But the testator's will as their Lordships read it would, after the death of Sarat Kumari, have left the appellant for the remainder of her life by virtue of the *jus accrescendi* in enjoyment of her

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sister's moiety as well as of her own, and it remains to be determined by way of answer to the second question raised by the appeal how far this position has been altered by the ekrarnama of the 17th April 1909, to which reference has already been made.

The effect of that document so far as construction is concerned is as it seems to their Lordships too clear for argument. At its date, as above appears, and as is stated therein, one sister had one son and the other sister had three sons. Each was apprehensive that on the death of one of them there would be during the life-time of the other disputes arising between the son or sons of the deceased sister on the one hand and the surviving sister on the other. The ekrarnama accordingly provides that if one of the sisters should die the son or sons of the predeceased should so long as the other sister lives remain owners in possession in the same manner as his or their mother had been of the one half share of the movable and immovable property left her by her father. On the death of the surviving sister the sons of both are to have such right and share as they are entitled to get under the testator's will.

It is under this ekrarnama that the respondents claim to remain in possession of their mother's moiety of the estate. That its provisions are apt to give them the right they claim was hardly contested before their Lordships. But it was contended that the ekrarnama was not binding upon the appellant at all: it was, in the event which had happened, no more than a grant in favour of the respondents, and while still a mere expectancy, of the interest in Sarat Kumari's moiety to which, under the will the appellant, by the operation of the *jus accrescendi*, might become entitled on her sister's death in her own lifetime: it was accordingly void on the principle enunciated in the decisions of the Board in *Harnath Kuar v. Indur Bahadur Singh* (1) and *Annada Mohan Roy v. Gour Mohan Mullick* (2), with reference to the attempted disposition of his expectancy by a presumptive reversioner during the lifetime of a Hindu widow.

Their Lordships were not impressed by this contention of the appellant in support of which, as was admitted, no authority could be found.

But they do not propose further to discuss it. It was raised before the Board for the first time. It suggests, if there be any-

(1) (1922) L. R. 50 I. A. 69; I. L. R. 47 All. 346; 38 C. L. J. 346.

(2) (1923) L. R. 50 I. A. 239; I. L. R. 50 Calc. 229; 40 C. L. J. 10.

thing in it, considerations of far-reaching importance upon which the Board would desire to have the benefit of the opinion of the Courts in India. Accordingly, their Lordships do not entertain it at all. And to the ekrarnama no other objection was taken.

In the result, therefore, the appellant has failed to satisfy the Board that the judgment and decree appealed from were otherwise than correct. Their Lordships accordingly will humbly advise His Majesty that this appeal therefrom be dismissed and with costs.

*Watkins & Hunter*: Solicitors for the Appellant.

*Stanley, Johnson & Allen*: Solicitors for the Respondents.

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*Appeal dismissed.*

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PRESENT :—*Lord Carson, Lord Darling, Sir Lancelot Sanderson,  
Sir George Lowndes and Sir Binod Mitter.*

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v.

ROBERT HERCULES SKINNER AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE  
AT ALLAHABAD.]

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July, 16.

*Specific performance—Agreement to execute a registered sale deed—Sale deed not registered—Registration Act (XVI of 1908), Secs. 17, 49.*

If an instrument which comes within section 17 of the Registration Act as purporting to create by transfer an interest in immovable property is not registered, it cannot be used in any legal proceedings to bring about indirectly the effect which it would have had if registered. It is not to 'affect' the property, and it is not to be received as evidence of any transaction 'affecting' the property. An agreement for the sale of immovable property is a transaction 'affecting' the property: *Sanjib v. Santosh* (1); *Saiya Narayana v. Chinna Venkata Rao* (2) and *Remling Perwatayya v. Bhagwant* (3) approved.

As the document in the present case clearly purports to transfer A's interest in the immovable properties which he had inherited from B, it comes within the terms of section 17 of the Registration Act and requires registration. It being unregistered, is not admissible in evidence in a suit for specific performance of

(1) (1921) I. L. R. 49 Calc. 507.

(2) (1925) I. L. R. 49 Mad. 302.

(3) (1925) I. L. R. 50 Bom 334.

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the agreement that the vendor shall, if the vendee so requires, execute a registered sale deed.

P. C. Appeal No. 97 of 1928 by the Defendant against the judgment and decree of the High Court of Judicature at Allahabad, reversing those of the Subordinate Judge.

The material facts appear from the judgment of their Lordships.  
*De Gruyther K. C.* and *Brown* for the Appellant.

*Dunne K. C.* and *Raihes* for the Respondents.

The judgment of their Lordships was delivered by

July, 16.

**Sir George Lowndes** :—One Richard Skinner died in 1913 intestate, and his estate, which included immovable properties of considerable value, devolved upon his brother George Skinner and his sister Alice Skinner in equal shares. Richard Skinner was at the time of his death indebted to the Delhi and London Bank, and administration of his estate was granted to a Mr. Angelo, the Bank's manager. On the 18th June, 1918, while the estate was still under administration, George Skinner executed in favour of Robert Hercules Skinner, the first respondent in this appeal, a document in the following terms :—

[*The first sentence is torn out.*]

"This day between Mr. (torn out) at present at Meerut of the one part, hereinafter called the first party, and Mr. R. H. Skinner of Hansi of the second part, hereinafter called the second party.

"Whereas Mr. G. C. E. Skinner, the said first party (paper torn), heir to the estate of his late brother, Mr. R. R. Skinner, and the said first party therefore as heir has a (paper torn) in the property allotted to the late Mr. R. R. Skinner by the decree of the District Judge, Delhi, of August, 1888, partitioning the joint Skinner estate; and in all the property he subsequently acquired. And that whereas my brother R. R. Skinner died in about August, 1913, and that since his death there has been constant trouble and long, expensive and ruinous litigations and family disagreement, etc., owing to which vendor has not been able to get possession up to date, nor gets any benefit from it whatsoever.

"That whereas now Mr. R. H. Skinner of the second part, hereafter called the vendee, has agreed to purchase all these properties left me by my said late brother, Mr. R. R. Skinner.

"Therefore I, G. C. E. Skinner of the first part, hereafter called the vendor, with my free will, wishes and consent do hereby sell all my share, I have inherited from my late brother, Mr. R. R. Skinner, to Mr. R. H. Skinner for Rs. fifty thousand, to keep the

property in the family and for all what the vendee has done for me, it is therefore mutually agreed as follows :—

"1. That the vendee, Mr. R. H. Skinner, do pay to the said vendor, Mr. G. C. Skinner, Rs. one thousand as earnest money by cheque.

"2. That as all this property is in the hand of Mr. Angelo, the administrator of the estate of my late brother, Mr. R. R. Skinner, the vendor will do his best to get the vendee full possession.

"3. Should for any reason the vendor fail or do not satisfy the vendee, in this case the vendee has my free consent to take any action he considers proper and necessary to get full possession, and mutation of names done in the said vendee's favour.

"4. From the date of agreement all expenses for litigation now pending which, if the vendor chooses to hand over to the vendee or that may hereafter be filed by the vendee in the above matter, will be borne by the vendee.

"5. That the cases now pending and all matters with reference to these properties, the said vendor shall give a correct and complete list of all cases, also a list of all papers and books, etc., in the possession of the said vendor to the said vendee and take a receipt for any reason, the vendor fail, the vendor will be responsible for loss, etc., and not the vendee.

"6. In addition to the price stated above the said vendee will have to pay the Delhi and London Bank, Delhi, vendor, share of the debt left by the late Mr. R. R. Skinner, but the said vendor will pay all debts the said vendor may have contracted on this said property after the death of the late Mr. R. R. Skinner and release it for the vendee.

"7. That the vendor declares that he is the sole heir to this said property, but should other heirs be established . . . by order of any Court the vendor is not responsible.

"8. The said vendor confirms this to be a complete and conclusive sale binding on the said vendor and on all his heirs or assigns, etc., in favour of the said vendee . . . and if the vendee should ever consider necessary to execute a Registered sale-deed . . . vendor or his heirs, assigns, etc., will always be ready to execute and register the same at the expenses of the vendee.

"9. In virtue of this sale and agreement if the vendee considers necessary the vendor will always be ready to execute and register a power of attorney or give the vendee any other document or help the vendee may demand.

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"10. The balance of Rs. forty-nine thousand will be paid by the vendee to the vendor the very year the vendee gets full legal possession of all the properties and the mutation of names all effected in the name of the vendee.

"11. Should the vendee not be able to get mutation of names done in his name and get full and complete possession during the lifetime of the vendor the vendor in such case directs the vendee or his heir, Mr. J. A. R. Skinner, to pay the balance due to the heirs of the vendor.

"12. The schedule of the properties sold is hereunto annexed as noted below :—

"(a) All the properties noted in the decree of the District Judge, Delhi, August, 1888, partitioning the joint Skinner estates. (Ingram v. Orde and other.)

"(b) All the properties acquired by the late Mr. R. R. Skinner up to the time of his death. Therefore we, the undersigned, further confirm and ratify this sale and agreement by our signatures.....

"Meerut, 18th June, 1918.

(Sd.) GEORGE C. E. SKINNER, Vendor.

(Sd.) R. H. SKINNER, Vendee."

This document was not registered.

George Skinner died intestate in December, 1919, and on the 11th February, 1921, the first respondent instituted the suit out of which this appeal arises. The only defendant to the suit as originally framed was Angelo, the administrator of Richard Skinner's estate, and the principal prayer of the plaint was for specific performance of "the agreement of sale dated 18th June, 1918"—the reference being to the document above set out—and for possession of the property. It is obvious that Angelo did not represent George Skinner's estate, and it is admitted that in this respect the suit was defective, but various parties were subsequently added, including Alice Skinner, whose right to a half-share in Richard Skinner's estate was disputed in the Court of first instance, and Thomas Skinner, the third respondent, who was appointed administrator *ad hoc* of George Skinner. Major Stanley Skinner was also substituted for Angelo as administrator of Richard Skinner, and on the death of Alice Skinner, pending the proceedings in India, James Skinner, the present appellant, was brought on the record as her executor.

Various matters were debated in the course of the proceedings in India, with which their Lordships have not been asked to deal,

but the principal issue in the case, and that upon which the determination of this appeal depends, was whether the document of the 18th June, 1918, was admissible in evidence. This in the argument before the Board has resolved itself into two questions, viz., (1) whether the document comes within the provisions of section 17 of the Indian Registration Act XVI of 1908 and so required registration; and (2) whether, if registration was necessary, it could form the basis of a suit for specific performance notwithstanding the provisions of section 49.

On the first question the Subordinate Judge by whom the suit was tried was of opinion that the document was a sale deed requiring registration under section 17, and that, being unregistered, it was not admissible in evidence, and he accordingly dismissed the suit. The High Court, on appeal, differed from this conclusion. The learned Judges held that the document ought to be "treated as being an agreement for sale rather than as a sale deed," and that, therefore, registration was not necessary, and they made a decree for specific performance in respect of George Skinner's moiety of the property upon certain terms. Against this decree the executor of Alice Skinner has appealed to His Majesty in Council.

In the course of the arguments the document of the 18th June, 1918, has been discussed with great minuteness, but their Lordships have no doubt that the view taken of it by the Subordinate Judge was right. The language employed is perhaps not that of a trained draftsman, but it clearly purports to transfer George Skinner's interest in the immovable properties which he had inherited from Richard Skinner, particulars of which are set out in the schedule, and it accordingly comes within the terms of section 17 of the Act and required registration.

The second question is perhaps a more difficult one, though the difficulty arises rather from the divergent views to be found in the Indian case law on the subject than from the interpretation of section 49 of the Registration Act. It is unfortunate that this aspect of the case was not submitted to the Indian Courts, and their Lordships have therefore not had the assistance of the High Court in discussing the numerous decisions which have been referred to before them.

Their Lordships, however, think that the meaning of section 49 is clear. The section runs as follows:—

"49. No document required by section 17 to be registered shall—

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- (a) affect any immovable property comprised therein ; or,
- (b) confer any power to adopt ; or
- (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered."

If an instrument which comes within section 17 as purporting to create by transfer an interest in immovable property is not registered, it cannot be used in any legal proceedings to bring about indirectly the effect which it would have had if registered. It is not to "affect" the property, and it is not to be received as evidence of any transaction "affecting" the property.

In the present case the document under consideration, in addition to creating an interest in the immovable property concerned, provides as one of the terms, and therefore as an integral part of the transfer, that the vendor should, if the vendee so requires, execute a registered sale deed, and it is contended for the first respondent that, notwithstanding the non-registration, he can sue upon this agreement, putting the document in evidence as proof of it. Their Lordships are clearly of opinion that this is within the prohibition of the section. They think that an agreement for the sale of immovable property is a transaction "affecting" the property within the meaning of the section, inasmuch as, if carried out, it will bring about a change of ownership. The intention of the Act is shown by the provision of section 17 (3) (v), which exempts from registration, and therefore frees from the restriction of section 49, a document which does not itself create an interest in immovable property, but merely creates a right to obtain another document which will do so. In the face of this provision, to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appears to their Lordships to be little more than an evasion of the Act.

A number of cases from the Indian Reports have been referred to on either side in the argument before this Board, and it is clear that many of the decisions are irreconcilable. Their Lordships think, therefore, that no good purpose would be served by a detailed examination of them, but they have the satisfaction of knowing that the principle which has been enunciated above is in accordance with recent decisions in most of the High Courts. See *Sanjib Chandra Sanyal v. Santosh Kumar Lahiri* (1); *Satya Narayana v. Chinna Venkata Rao* (2); *Ramling Parwatayya v. Bhagwant Shambhuappa* (3).

(1) (1921) I. L. R. 49 Calc. 507.  
 (3) (1925) I. L. R. 50 Bom. 334.

(2) (1925) I. L. R. 49 Mad. 302.



For the reasons given their Lordships are of opinion that the High Court was wrong in granting a decree for specific performance, and that the first respondent's suit should have been dismissed. They will therefore humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court should be set aside, and that of the Trial Judge restored. The first respondent must pay the appellant's costs both here and in the High Court.

*Chapman, Walker & Shepherd* : Solicitors for the Appellant.

*T. L. Wilson & Co.* : Solicitors for the Respondents.

A. T. M.

*Appeal allowed.*

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

*Patta—Lease—Reservation of trees by the zamindar—Passing of Madras Land Estates Act, 1908, during the continuance of lease, effect of—Madras Land Estates Act, Secs. 6, 12, 56.*

Section 12 of the Madras Land Estates Act, 1908, deals with a possession terminable when the Act came into force and converted into a permanent right of occupancy by section 6. It contemplates that as an incident of the terminable possession rights with respect to the trees or the holding might have been reserved to the landholder either by custom or by contract. It provides that where the reservation is by custom, it, so far as existing trees are concerned, is to remain effective throughout the whole of the occupancy, by the Act made permanent. In places where the custom obtains such reservation is conventional without being expressly made, in contra-distinction to places where no such custom exists—as, for example, in the *semi nadari* of North Vellore, in which case the reservation, if it is to be operative, must be expressed as part of the contract. But in each case the reservation, when not qualified, will be operative for precisely the same period of time and no longer—that is to say, until, on the expiry of the right to possession by the tenant, the holding reverts to the *zamindar*. Accordingly, the section makes no distinction in the result between

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a reservation made by custom and one made by contract. Where the reservation, however constituted, is coterminous with the previously limited possession, it remains, except with regard to trees subsequently planted by the *ryots* or naturally grown upon the holding, operative throughout the occupancy made permanent by the Act. The landholder cannot claim an enhancement of rent or any additional payment for his lost trees.

On the 6th June, 1901, the appellant Raja granted to the father of the respondents, for a term of 10 years expiring Fasli, 1320, a lease of some 1353 acres of land in the village of N. Prior to this lease in his favour, the lessee had no occupancy or other rights in the holding. Of the acres comprised some 843 were entered as being in cultivation, and 510 as being dry pasture waste. The annual rental for the whole was fixed at Rs. 1784-13 as representing, so far as the 'cultivation' lands were concerned, a rent of as. 14-2 per acre, and for the 'dry pasture waste' a rent of 8 annas per acre. The lease, however, contained a provision that if the lessee raised dry cultivation on the dry pasture waste he had to pay dist upon the land so cultivated at the higher rate of as. 14-2 per acre as well as the expenses. By the lease the Raja reserved to himself full rights in regard to 8000 palmyras and date palms fit for tapping. The lessee was "not in the least to be entitled to them," as the dist of all the trees standing on the lands was not included in the rent reserved, the lessee was not to raise any objection whatever to the *zemindar* dealing with the same.

After Fasli 1320, the Raja tendered to the respondents for the year 1912 a *pattah* in respect of such part of the original holding as he conceived himself bound to include in it. On the refusal of the respondents to accept the *pattah* tendered and to execute a proper *muckhala* this suit was, under section 56 of the Madras Estates Act, 1908, brought by the Raja to enforce his right:

*Held*, that the *zemindar* was entitled to continue to reserve the right by the *pattah*, limited to the trees which existed before the Madras Estates Act and not extending to any which might have been planted by the respondents or might naturally have grown upon the holding since its passing.

That of the 520 acres, 223 acres being tank-bed land, should be excluded from the *pattah* and the remaining 297 acres should be included as being "cultivable" land, although it had never in fact been cultivated.

Privy Council Appeal No. 115 of 1924 by the Plaintiffs, against the decree of the High Court of Madras, dated the 22nd April, 1918, reversing in part that of the Deputy Collector, dated the 17th August, 1914.

The material facts appear from their Lordships' judgment.

*Subscribers* for the Appellants.

*Duns K. C. and Narisamiar* for the Respondents.

The judgment of their Lordships was delivered by

Lord Blanesburgh.—There are two questions raised by this appeal: they both lie within the narrowest compass; the second of them barely survives to come before the Board, so complete has been judicial agreement upon it in India, while the determin-

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tion of the first, which now alone is serious, depends upon the construction of a few words in a single section of a statute. Yet the plaint in the suit was issued as long ago as the 18th October, 1912, and it is nearly seventeen years thereafter that these short questions reach the Board for final determination, and, in the result will now be settled as they were settled by the Revenue Court in India nearly fifteen years ago. In the course of the proceedings not only has the plaintiff died, but one of his legal representatives, originally appellant, has dropped out, leaving it to the plaintiff's other representative, the second appellant, by himself to bring his case to a hearing. Not the least important of their Lordships' duties in disposing of the appeal has been the task of determining how the costs thrown away as the result of well-nigh interminable proceedings in India should now be borne.

The two appellants are the sons and legal representatives of the original plaintiff, the late Raja of North Vellore. On the 6th June, 1901, the Raja granted to one Ramayya Garu, father of the respondents, for a term of ten years, expiring Fasli, 1320, a lease of some 1,363 acres of land in the village of Narayanapuram. Prior to this lease in his favour, Ramayya Garu had, as it is now agreed, no occupancy or other rights in the holding, which, but for the passing of the Madras Estates Land Act, 1908, would in ordinary course have reverted to the *Zemindar* on the expiry of the lease.

Of the acres comprised in it some 843 were entered as being in cultivation, and 520 as being dry pasture waste. The annual rental for the whole was fixed at Rs. 1,784-13, representing, so far as the "cultivation" lands were concerned, a rent of Rs. 0.14.2 per acre, and for the "dry pasture waste" a rent of 8 annas per acre. The lease, however, contained a provision, much relied upon by the appellant in support of his second ground of appeal, that if the lessee raised dry cultivation on the dry pasture waste he had to pay *cist* upon the land so cultivated at the higher rate of Rs. 0.14.2 per acre as well as expenses.

The main, if not the only real, question now at issue between the parties is as to their respective rights in what the District Judge, at one stage of the case, described as an immense belt upon the holding of paying trees—comprising at least 8,000 palmyras and date palms fit for tapping, yielding a substantial revenue, and estimated by a succeeding District Judge to be of a capital value of roughly Rs. 34,000. By the lease the Raja or *Zemindar*

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reserved to himself full rights in regard to all these trees. The lessee was "not in the least to be entitled to them"; as the cist of all the trees standing on the lands was not included in the rent reserved, the lessee was not to raise any objection whatever to the *Zemindar* dealing with the same. And, as a matter of fact, these trees during the term continued to be let by the *Zemindar* to other persons for tapping at rents yielding for him a substantial revenue. It was not contested before the Board that in these circumstances, the possession of and all rights over the trees remained during the pendency of the lease in the *Zemindar*, and that no payment whatever in respect of them was included in the cess thereby reserved.

In that state of things and while the lease was still current, the Madras Land Estates Act, 1908, became law. This suit is concerned with the changes by the passing of that Act effected in the relations of the zemindar as lessor on the one hand, and the respondents, who by the death of their father had then become entitled to the lease, on the other, in respect of the subsequent property rights, first, in the trees—the important question—and next in the "dry pasture waste," now at all events a subordinate matter.

It will be convenient to call attention at once to the provisions of the statute relevant to the consideration of these two questions.

In the Act which came into force on 1st July, 1908, an estate means amongst other things any permanently settled estate or temporarily settled *zemindari* [Section 3 (2) a]; that is to say, it extends to the state or *zemindari* of the Raja of North Vellore. Holding [Section 3 (3)] means a parcel or parcels of land held under a single *putta* or engagement in a single village. In other words, the lands included in the lease of 1901 are by that term aptly described. *Ryoti* land means cultivable land in an estate other than private land, but does not include, *inter alia*, tank-beds [Section 3 (16)]. *Ryot* means a person who holds for the purpose of agriculture *ryoti* land in an estate on condition of paying to the landholder the rent which is legally due upon it [Section 3 (15)]. With these terms so defined section 6 provides that, subject to the provisions of the Act, every *ryot* then in possession of *ryoti* land situate in the estate of a landholder shall have a permanent right of occupancy in his holding, while Section 9 enacts that no landholder shall as such be entitled to eject a *ryot* from his holding otherwise than in accordance with the provi-

sions of the Act. Section 12, upon which much turns, is textually as follows :—

“ Subject to any rights which by custom or by contract in writing executed by any *ryot* before the passing of this Act are reserved to the landholder, every occupancy *ryot* shall have the right to use, enjoy and cut down all trees now in his holding, and in the case of trees which after the passing of this Act may be planted by the *ryot* or which may naturally grow upon the holding, he shall have the right to use, enjoy and cut them down, notwithstanding any contract or custom to the contrary.”

Section 24 provides that the rent of a *ryot* shall not be enhanced except as provided by the Act. Section 28 : that in all proceedings under the Act the rent or rate of rent for the time being lawfully payable by a *ryot* shall be presumed to be fair and equitable until the contrary is proved. Section 30 enables a landlord to institute proceedings for enhancement of rent before the Collector on certain stated grounds and no others. By section 50 (2) every *ryot* is entitled to call upon his landholder to grant him a *puttah* for any current revenue year, and every landholder is entitled to call upon his *ryot* to give him a *muchalka* in exchange. The proper contents of the *puttah* and *muchalka* are detailed in section 51, and after provision made by section 54 for the tender of a *puttah* by the landholder, Section 56 provides—and it is under this section that the present suit was instituted—that when a *ryot* for one month fails to accept the *puttah* tendered to him and to give a *muchalka* in exchange, the landholder may sue before the Collector to enforce acceptance of such *puttah*.

As their Lordships have already observed, the lease of the 6th June, 1901, was still current when the Estates Act came into force. The effect of the statute, as will have been seen, was at once to give to the respondents a permanent right of occupancy in their holding so far as that consisted of *ryoti* land, and at once to supersede many of the provisions of the lease then current. Notwithstanding this, however, the parties until the expiry of the term apparently allowed their relations towards each other to be regulated by the lease, and it was not until after Fasli, 1320, that the Raja tendered to the respondents for the year 1912 a *puttah* in respect of such part of the original holding as he conceived himself bound to include in it. On the refusal of the respondents to accept the *puttah* tendered and to execute a proper *muchalka* this suit was, under section 56 of the Act, brought by the Raja to enforce his statutory rights in these matters.

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The refusal of the respondents to accept the tendered *puttak* was due to the fact that in their view its terms were, mainly in two respects improper.

First, there were included in it the provisions of the lease already referred to, whereby the trees on the holding were reserved to the landholder, and the respondents objected that, by virtue of Section 12 of the Act, the *puttak* should have left with them the right to use, cut down and enjoy all trees in their holding.

Secondly, there were excluded from the *puttak* the 520 acres of dry pasture waste which had been included in the lease. The respondents claimed that this acreage should remain part of their holding as being in fact cultivable and therefore *ryoti* land within the meaning of the Act.

It will be convenient to deal in their order with these two objections to the *puttak*, showing incidentally how each of them fared in the Courts in India.

First, as to the trees, the Deputy Collector in his judgment of the 17th August, 1914, in the Revenue Court expressed the opinion that, as the *Zemindar* had reserved his right to them by written contract, he was entitled, under section 12 of the Act, to continue to reserve the right by the suit *puttak*, limited, however, to the trees which existed before the Act and not extending to any which might have been planted by the respondents or might naturally have grown upon the holding since its passing. The learned District Judge, on appeal on this point by the respondents, took the same view, and by decree of the 22nd December, 1916, dismissed their appeal from the Collector's judgment.

On further appeal, however, to the High Court at Madras, the learned Judges there took a different view, which they expressed in a judgment of the 22nd April, 1918. Under section 12 of the Estates Land Act, the tenant, they said, was, subject to custom or written contract, entitled to the trees on payment of rent to the landholder, and in this case the reservation of the trees in the lease held good, but, in their opinion, only for the period of the lease. The reservation was no longer subsisting at the time of the tender of the *puttak*, and it ought not accordingly to have been retained therein. Other reasons given by one of the learned Judges in support of the same conclusion have not been relied on before the Board, and need not be further alluded to.

In the result the learned Judges of the High Court, thinking that the trees must be included in the holding, but that it was allowable under the Act to charge the respondents with a cost

in respect thereof, directed an enquiry to ascertain the proper amount of such cist, and after prolonged and elaborate proceedings to that end, to which for the moment their Lordships do not further allude, the High Court, in a final judgment on the 28th October, 1919, fixed the amount payable by the respondents in this behalf at a single payment of 5 annas in respect of each tree, and in other respects gave effect to their judgment of the 22nd April, 1918. And of all of this the appellant now complains.

The question turns, it will be seen, upon the meaning to be attached to the introductory words of section 12 of the Act: "Subject to any rights which by custom or by contract in writing executed by any *ryot* before the passing of this Act are reserved to the landholder," and it may be conceded that, as a matter of first impression, the view of these words taken by the High Court is attractive enough. There is, on the face of them, no obvious reason why the reservation should extend beyond the duration of the contract by which it is made. But this first impression disappears on a closer examination of the clause. The section is certainly dealing with a possession terminable when the Act came into force and converted into a permanent right of occupancy by section 6. It is contemplating that as an incident of the terminable possession rights with respect to the trees on the holding might have been reserved to the landholder either by custom or by contract. It provides that where the reservation is by custom, it, so far as existing trees are concerned, is to remain effective throughout the whole of the occupancy, by the Act made permanent. So much it was conceded in argument was the effect of the section. But if reservation by custom was so long operative, why, so far as the section is concerned, should the result be different when the reservation had been made by contract? A reservation by custom is in this connection surely no more than this, that in places where the custom obtains such reservation is conventional without being expressly made, in contra-distinction to places where no such custom exists—as, for example, in the *Zemindari* of North Vellore, in which case the reservation, if it is to be operative, must be expressed as part of the contract.

But in each case the reservation, when not qualified, will be operative for precisely the same period of time and no longer—that is to say, until, on the expiry of the right to possession by the tenant, the holding reverts to the *Zemindar*. Accordingly, as might from this point of view be expected, the section makes no distinction in the result between a reservation made by

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custom and one made by contract, and in their Lordships' judgment, the true conclusion is, that where the reservation, however constituted, is conterminous with the previously limited possession, it remains, except with regard to trees subsequently planted by the *ryots* or naturally grown upon the holding, operative throughout the occupancy made permanent by the Act.

It would appear that the learned Judges of the High Court came to the conclusion they did in this matter in the belief that it was open to them under the Act to charge the respondents with a suitable payment in respect of the trees which for the first time by virtue of the Act became theirs. At a later stage, however, the learned Judges themselves were less confident of the correctness of this view, which is, as it seems to the Board, mistaken. Their Lordships can find no provision in the Act enabling the landholder to claim an enhancement of rent or any additional payment for his lost trees. Accordingly, if the view of this section taken by the High Court were correct, its effect in the present case must be altogether to deprive the landholder, without any kind of compensation provided, of property of great value, and its effect would be similar in many other cases. A construction of the section leading to such a result is not lightly to be entertained, and, in their Lordships' judgment, is not here called for. On this question, therefore, the Deputy Collector, supported by the learned District Judge, reached, in the view of the Board, the true conclusion.

The respondents' second objection to the *puttah* was the exclusion therefrom of the 520 acres, and this objection can be dealt with more briefly. Upon the evidence taken before him, the Deputy Collector on the 17th August, 1914, found that of the 520 acres in question, some 222 acres were tank-bed land, and that their exclusion from the *puttah* was, in consequence, justified under the Act. He held, however, in a most careful judgment, that the remaining 297 acres should be included as being "cultivable" land, although it had never in fact been cultivated, and this view of the Deputy Collector, although, so far as it was against them, it has been contested by both parties throughout the Courts in India, has been upheld in all of them. Before the Board the respondents no longer contended that the tank-bed land should be included in the *puttah*, but the appellant, relying for his contention upon the case of *Sreemantha Raja Yarlagada Mallikarjuna v. Subbiah* (1), still urged that the

(1) (1919) 39 M. L. J. 277.



remaining 297 acres were given only for pasturage and not for cultivation, that, like the tank-bed lands, they should remain excluded from the *puttak*, the provision of the lease already referred to, which raised the rent per acre to Rs. 0-14-2 on the extent cultivated, being meant to serve as a penal rent against the land being improperly used for cultivation purposes. Their Lordships cannot accept this argument. They prefer the explanation of the provision referred to, given by the Deputy Collector, which they give in his own words :—

“The reason why an alternative rate, i. e., a lower rate, was conceded in case of non-cultivation was apparently due to the facts that the land was waste before, that it would take some years before it could be reclaimed and brought under cultivation, and that it would be a hardship on the lessee if he were not allowed to pay a favourable rate till then. He was not, therefore required to pay the full rate immediately.”

In their Lordships' judgment accordingly this portion of the appellant's appeal entirely fails, and in the result the suit *puttak* as it was adjusted by the Deputy Collector on the 17th August, 1914, was rightly adjusted, and the subsequent attempts on both sides to have its terms varied have been misconceived.

In that state of things a very serious question arises as to the costs of these attempts. Their Lordships have considered this question very carefully, inquiring how far these costs have been occasioned by mistaken views contended for by one side or by the other. For the costs thrown away by the prolonged inquiries to ascertain the proper sum to be paid in respect of what may be called the suit trees, the respondents are mainly, if not entirely, responsible for the costs thrown away in ascertaining what may again be described as the appealable value of the trees, they were in the view of the Board, entirely responsible. The increase again in the costs throughout by the appellants' mistaken contention as to the cultivable lands has been relatively slight. In the result their Lordships have reached the conclusion that, no interference being made with the order as to costs in the Decree of the Revenue Court of the 17th August, 1914, or in that of the District Court of the 22nd December, 1916 the justice of the case will be met if the respondents pay three-fourths of the subsequent costs incurred by those representing the original plaintiff or his estate, whether in the High Court, in the District Court, or on this appeal.

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In the result accordingly their Lordships will humbly advise His Majesty that this appeal be allowed; that the order of the High Court of the 28th of October, 1919, except in so far as it affirms the decree of the District Court of the 22nd December, 1916, be discharged, and that the last-mentioned decree be restored.

The respondents must pay the cost already specified.

*Chapman, Walker & Shepherd* : Solicitors for the Appellants.

*H. S. L. Polak* : Solicitors for the Respondents.

A. T. M.

*Appeal allowed.*

PRESENT :—*Lord Blanesburgh, Lord Tomlin and Sir  
 Binod Mitter.*

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 1929.  
 June, 21.

SHIB CHANDRA AND ANOTHER

v.

LACHMI NARAIN AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE  
 AT ALLAHABAD.]

*Deposit—Transfer of Property Act (IV of 1882), Secs. 52, 83—Suits realise interest on mortgage money by sale—Interest pending suit not decreed by primary Court but awarded in appeal—Sale of equity of redemption pending appeal—Purchase subject to result of appeal—Lis pendens—Government revenues.*

On the 14th January, 1910, the mortgagees brought a suit against the mortgagors for recovery of interest up to June, 1909. They claimed interest *pendente lite* and interest up to realisation, and also prayed for sale of the mortgaged properties in default of the payment of the amount that might be decreed in their favour and claimed possession of the mortgaged premises. The primary Court passed a decree in their favour on the 23rd February, 1912, and ordered that in default of the payment of the decretal amount on or before the 22nd August, 1912, the property will be sold under O. 34 R. 4 of the Code of Civil Procedure, but it did not allow any interest pending suit. The mortgagees appealed against the decree and the appellate Court on the 20th January, 1914, varied that decree by allowing interest during the pendency of the suit to the extent of Rs. 2706-2 as. and allowed the costs of the appeal, which were fixed at Rs. 416-12-6 p. The decree was therefore increased by Rs. 3122-14-6p.

While the appeal of the mortgagees was pending, the mortgagors on the 12th April and 22nd June, 1912, sold and conveyed their equity of redemption to the respondents.

On the 29th June, 1912, the purchasers tendered certain amount in the Court under section 83 of the Transfer of Property Act and the question in the case was whether the purchasers were bound to pay the amount decreed by the appellate Court on the 29th January, 1914 :

*Held*, that the purchasers were bound to deposit in their application under section 83 of the Transfer of Property Act, the excess amount decreed by the appellate Court. The purchasers had no higher rights than their vendors and the sale having been made during the active prosecution of the litigation between the mortgagees and the mortgagors, they were bound by the result of the litigation : *Faiyaz Hussain v. Prag Narain* (1).

That the mortgagees by paying the Government revenue were entitled to add the same for the purpose of ascertaining their total dues under their mortgage : *Nagenderchunder v. Sreenutty Kamisso Dassee* (2).

Privy Council Appeals Nos. 126 and 127 of 1926 by the Defendants Mortgagees against two decrees of the High Court of Judicature at Allahabad, dated the 11th December, 1923, reversing those of the Subordinate Judge of Moradabad, dated the 18th January, 1921.

The material facts appear from the judgment of their Lordships.

*Dunne K. C.* and *Dube* for the Appellants.

*De Gruyther K. C.* and *Parikh* for the Respondents.

The judgment of their Lordships was delivered by

Sir Binod Mitter :—These are two consolidated Appeals against two decrees dated the 11th December, 1923, of the High Court of Judicature at Allahabad, setting aside two decrees dated the 18th January, 1921, of the Court of the Subordinate Judge, Moradabad.

The two suits in which the decrees of the High Court were passed were brought by the plaintiffs respondents separately against the appellants to redeem two items of properties covered by a mortgage dated the 23rd March, 1905, namely, 13 Biswas of the village Sadat Bari and the whole village Rudain, respectively, and the question for determination now is whether the deposit made by the plaintiffs under section 83 of the Transfer of Property Act on the 29th June, 1912, was sufficient.

On the 23rd March, 1905, the original mortgagors executed a mortgage deed in favour of the appellant Shib Chandra and another who, on the same day executed a lease in favour of the mortgagors

(1) (1907) 4 L. R. 29 All. 339 ; L. R. 34 I. A. 102 ; 5 C. L. J. 563.

(2) (1867) 11 Moo. I. A. 241 (258).

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in respect of the mortgaged premises and under that lease the mortgagors agreed to pay Rs. 2,325 in two instalments per annum (which also was the agreed amount of interest under the mortgage deed), together with the sum of Rs. 1,526 as Government revenue on the properties. It was agreed that if there was any deficiency in the payment of interest or lease money then the amount should carry compound interest at the rate of 1 Re per cent. per mensem. It was provided by the mortgage deed that each property could be separately redeemed in the month of June of any year on payment of the amount entered against it in the deed provided always that the interest on the whole mortgage money had been paid or tendered at the time of such redemption. The consideration stated in the mortgage deed was Rs. 35,000. The only sum the mortgagors ever repaid was Rs. 1,000 in January, 1907.

On the 14th January, 1910, the mortgagees brought a suit in the Court of the Subordinate Judge of Moradabad (hereinafter referred to as the original suit) against the mortgagors for recovery of Rs. 12,327-5, being the interest or lease money up to June, 1909, together with compound interest at 12 per cent. per annum as provided for in the mortgage deed and in the lease. The mortgagees further claimed interest *pendente lite* and interest up to realization, and they also prayed for sale of the mortgaged properties in default of the payment of the amount that might be decreed in their favour and claimed possession of the mortgaged premises. The mortgagors contended that the whole of the Rs. 35,000 mentioned in the mortgage deed had not been advanced, but that a sum of Rs. 30,984 was only advanced and that the interest payable on the mortgage or the lease money should be proportionately reduced.

On the 23rd February, 1912, the Subordinate Judge decided that the sum actually advanced was Rs. 30,984, and that, therefore, the amount of annual interest or lease money was Rs. 2,058-3-6 and not Rs. 2,325, as stated in the mortgage deed and the lease. He accordingly passed a decree for Rs. 10,720-10-4 and interest thereon at the rate of 6 per cent. per annum until realization with costs amounting to Rs. 1,770-2-8. He also gave the mortgagees a decree for sale under Order XXXIV, Rule 4 of the Code of Civil Procedure, 1908, in default of the payment of the decretal amount on or before the 22nd August, 1912, and he further decreed that Rs. 12,812-7-3 would be due on that date. He further decreed possession of the mortgaged properties to the mortgagees,

and they, on the 3rd April, 1912, obtained symbolical but not actual possession.

It appears that the Subordinate Judge did not allow any interest during the pendency of the original suit and the mortgagees (that is the present appellants) appealed against the decree of the Subordinate Judge to the High Court of Judicature at Allahabad and the High Court, on the 27th January, 1914, varied the decree of the Subordinate Judge by allowing interest during the pendency of the suit to the extent of Rs. 2,706-2, and they allowed the costs of the appeal, which were fixed at Rs. 416-12-6. The decree of the Subordinate Judge was therefore increased by Rs. 3,122-14-6.

While the appeal of the mortgagees was pending the mortgagors on the 12th April, 1912, sold and conveyed their equity of redemption in Mauza Sadat Bari to Pandit Bihari Lal (the predecessor-in-interest of the present plaintiffs in the first suit—that is suit No. 333 of 1919), and they also on the 22nd June, 1912, sold and conveyed their equity of redemption in Mauza Rudain to Rameshwar Sahai and Bhola Nath (the latter being the predecessors-in-interest of respondents two and three in suit No. 371 of 1919).

In the mortgage deed in suit the sum of Rs. 13,000 was entered as the principal amount against Village Rudain, and the sum of Rs. 5,000 was entered as the principal against Sadat Bari. Bihari Lal, the purchaser of Sadat Bari, also purchased certain other items of property; i. e., a grove consisting of some land in Majahidpur Sarai and certain houses and shops, and the sum of Rs. 4,000 was entered against them as the principal. This last-mentioned property is not the subject matter of the suits for redemption.

The conveyance of the 12th April, 1912, mentioned that the sum of Rs. 32,000 was left with the purchaser for payment of the miscellaneous debts due under decrees and mortgage money and other debts, etc., payable by the vendors, and it was agreed that the vendors should cause to be paid by the purchaser under their supervision the sum of Rs. 32,000 to the creditors of the vendors. By the deed of the 27th June, 1912, the sum of Rs. 13,000 was left with the purchasers of Village Rudain for payment to the mortgagee.

On the 29th June, 1912, a sum of Rs. 41,837-5-6 was deposited in Court by the purchasers under section 83 of the Transfer of Property Act, and the respondents allege that on this deposit being

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made they were entitled to call upon the mortgagees to reconvey the properties which they had purchased.

The question is whether this sum was sufficient. The sum of Rs. 41,837-5-6 was made up of the following items:—

- (a) Rs. 16,120-14-6 for principal allocated for redemption of all the properties purchased by Bihari and interest on the entire mortgage from January, 1910, to June, 1912.
- (b) Rs. 4,716-7-0 paid by Bihari towards satisfaction of the decree in part of the original suit.
- (c) Rs. 13,000-0-0 paid by Rameshwar Sahai.
- (d) Rs. 8,000-0-0 paid by Rameshwar Sahai towards the decree in the original suit.

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Rs. 41,837-5-6

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The Subordinate Judge in his judgment has held that the sum that the purchasers ought to have deposited was Rs. 45,935-13-3. He held that although the judgment of the High Court was not delivered till January, 1914, still on the date of the tender that sum which the High Court allowed in addition to what the Subordinate Judge in the original suit had awarded was in fact due on the 29th June, 1912. He also held that although the principal sum of Rs. 35,000 had been held not to have been paid, but that only Rs. 30,984 had been advanced on the mortgage, still there should be no proportionate reduction of the sums fixed for the redemption of each item of property as entered in the mortgage deed against that property. He further held that the costs of the appeal to the High Court as also the land revenue that had been paid to the Government by the mortgagees with interest thereon should be taken into account. In his view Rs. 45,935-13-3 was the sum that the purchasers had to pay before they could redeem the properties purchased by them. Accordingly he held that the tender fell short by Rs. 4,098-7-9. On appeal, however, the High Court held that the sufficiency of the amount of deposit should be judged by the state of things on the 29th June, 1912, irrespective of the result of the appeal, and they further held that as only Rs. 30,984 was advanced instead of Rs. 35,000, the equitable method of dealing with this would be to distribute the reduction of principal over each item of property specified at the foot of the mortgage, and that by adopting this method the principal sum payable by the purchasers would be Rs. 19,472-12-11 instead of Rs. 22,000.

Their Lordships are of opinion that the view of the High Court on this last-mentioned point is correct, and in fact Mr. Dunne, for the appellants, did not seriously contest it. Their Lordships are, however, of opinion that the purchasers were bound by the decision of the High Court whereby that Court increased the amount awarded by the Subordinate Judge in the original suit by Rs. 3,179. The purchasers can have no higher rights than their vendors, and it appears to their Lordships also that the sale having been made during the active prosecution of the litigation between the mortgagees and the mortgagors, the purchasers must be bound by the result of the litigation (see Section 52, Transfer of Property Act, and I. L. R. 29 Allahabad 339 (P. C.)).

Their Lordships are further of opinion that Rs. 926-9-10 were due to the mortgagees, for Government revenue and interest thereon, both by the terms of the mortgage deed and the lease as also by the general law of mortgage in India.

The High Court in its judgment has held that the whole of this sum should not be added for the purpose of testing the sufficiency of the tender, but that it should be equitably distributed as against the purchasers in the same way as the principal amount of Rs. 22,000 is to be distributed. Even if this view were taken, the amount would work out at about Rs. 614, which would make no difference in the result.

Their Lordships, however, think that this view of the High Court is not correct. It is quite clear that the mortgagees by paying the Government revenue are entitled to add the same for the purpose of ascertaining their total dues under their mortgage. [*See Nugenderchunder Ghose v. Srimutty Kaminac Dosses* (1)]. In the present case under the mortgage deed Government revenue has to be deducted in the first instance from the entire income, therefore, it should be deducted before any credit for interest is given at all, and when the tender of interest was made on the 29th June, 1912, the mortgagees were entitled to deduct the Government revenue paid by them and interest thereon from the interest which had been paid by the mortgagors and only credit the balance to the interest account, and as the purchasers had to pay the entire interest before they could call for redemption, this suggestion of the High Court seems to their Lordships to be wrong.

Mr. De Gruyther contended that as the purchasers deposited all instalments of interest from January, 1910, to June, 1912, and added thereto the interest on the same they had thereby in fact

(1) (1867) 11 Moo. I. A. 241 (253).

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paid the full interest during the pendency of the original suit, namely, from June, 1909, to February, 1912.

The Subordinate Judge, in the original suit, had decreed interest up to June, 1909, and fixed the same at Rs. 10,720-10-4, therefore, on 1st June, 1910, the interest that must be calculated would be not only interest on the instalment from June, 1909, to June, 1910, but upon the decreed amount of Rs. 10,720-10-4, plus the instalment that fell due between June, 1909, and June, 1910, as the mortgage deed provided for compound interest. The argument of Mr. De Gruyther, therefore, seems more specious than sound. If calculation is made on this basis even then the deposit is insufficient.

Deducting, however, from the said sum of Rs. 45,935-13-3 (which the Subordinate Judge held due in June, 1912), the sum of Rs. 2,527-3-1, which represents the difference between the said principal sum of Rs. 22,000 and Rs. 19,472-12-11 which the High Court rightly held to be the principal sum payable by the purchasers, the deposit should have been for Rs. 43,405-10-2. The result, therefore, is that the deposit was insufficient and interest did not cease to run from the 29th June, 1912, and their Lordships accordingly hold that the decrees of the High Court should be set aside and the cases remitted for the ascertainment of the sum which is due to the mortgagees from the mortgagors and they are of opinion that a decree for redemption under Order 34, Rule 7, should be passed on the aforesaid basis.

The contesting respondents will pay to the appellants the costs of these appeals as also their costs in the Courts below. The mortgagees will also be at liberty to add their costs to their claim. The mortgagors, if they have incurred any costs, will bear the same.

Their Lordships will humbly advise His Majesty accordingly.

*H. S. L. Polak* : Solicitors for the Appellants.

*Douglas, Grant & Dold* : Solicitors for the Respondents.

A. T. M.

*Appeals allowed ; cases remitted.*



• PRESENT : *Lord Tomlin, Lord Salvesen, and Sir  
Binod Mitter.*

GNANENDRA KUMAR ROY CHOWDHURY AND OTHERS

*v.*

PRAFULLA NATH THAKUR.

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1929.

*June, 4.*

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE  
AT FORT WILLIAM IN BENGAL.]

*Plaint—Ambiguous—Defendant, duty of.*

The plaintiff was zemindar of Mouza Chur Daiya and the adjoining Mouza Daiya. In Mouza Chur Daiya there were four Howlas, of which three belonged to the defendants appellants and the fourth to the plaintiff. The plaintiff acquired by auction purchase the *taluk* of Adinath Roy. This *taluk*, according to the plaintiff's case, comprised lands both in Mouza Daiya and in Mouza Chur Daiya, but it was not proved that any part of the lands of the *taluk* were situated within Mouza Chur Daiya. Recently the disputed lands, which were within the Mouza Chur Daiya, were reformed and were taken possession of by the defendants. In a suit for recovery of possession, the plaintiff stated his title as zemindar and alleged that his zemindary included the Mouza Chur Daiya. The plaintiff further alleged that no right could accrue to the defendants in respect of the disputed lands and that the disputed land was the  *khas*  land appertaining to the plaintiff's *taluk* included in their zemindary. The plaintiff succeeded in his suit. The defendants contended that the only case raised by the plaintiff in his plaint was one based upon his ownership of the *taluk*, and that therefore he was not entitled to succeed in his zemindary title if he failed to establish his *taluk* title :

*Held*, that the plaint was intended to raise the case of zemindary title, as well as that of *taluk* title.

Even if, however, the plaint be regarded as ambiguous, all doubt as to its meaning was set at rest when the matter came before the primary Court. Before it the case of zemindary title was raised, and from that time onward that aspect of the case was kept well to the front. If the defendants were originally misled by the language of the plaint and desired an opportunity of calling further evidence directed to the case of zemindary title, it was their duty to make their application at the earliest possible moment.

Privy Council Appeal No. 130 of 1927 by the Defendants against a decree of the High Court of Judicature at Fort William in Bengal, dated the 9th July, 1925, affirming that of the District Judge of Barisal, dated the 8th March, 1923, reversing a decree of the Subordinate Judge of Barisal (except in one minor respect), dated the 22nd September, 1921.

*De Gruyther K, C.* and *Purikh* for the Appellants,

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*Dunne K. C. and Raikes* for the Respondent.

The judgment of their Lordships was delivered by

**Lord Tomlin** :—This is an appeal by the defendants in the suit against a decree dated the 9th July, 1925, of the High Court of Judicature at Fort William in Bengal.

The decree of the High Court affirmed the decree dated the 8th March, 1923, of the District Judge of Barisal, reversing (except in one minor respect) a decree dated the 22nd September, 1921, of the Subordinate Judge of Barisal.

As a result of the decisions of the District Judge and the High Court the plaintiff holds a decree for the recovery of possession from the defendants of certain alluvial lands in Mauza Chur Daiya, which is part of the plaintiff's *semindary*.

By this appeal the defendants seek to have this decree reversed and to have the plaintiff's suit dismissed.

The plaintiff raised a preliminary objection to the appeal based upon the allegation that the value of the subject matter of the suit or of the appeal was less than Rs. 10,000, but their Lordships are of opinion that this objection was not well founded, and that the appeal must be dealt with on its merits.

The plaintiff and his predecessors in title have been at all material times and the plaintiff now is entitled to a *semindary* which includes Mauza Chur Daiya and the adjoining Mauza Daiya.

In Mauza Chur Daiya there are four *howlas*, of which three, namely, Komar Ali, Asraf Ali, and Ensan Bibi, belong to the defendants, who acquired them by auction purchase.

The fourth *howlah*, namely, Ram Manikya Pal, was in the past acquired by auction purchase by the plaintiff or one of his predecessors in title and is now the property of the plaintiff.

The plaintiff or one of his predecessors in title also acquired by auction purchase the *taluk* of Adinath Roy, and the same is now owned by the plaintiff. This *taluk*, according to the plaintiff's case, comprised lands both in Mauza Daiya and in Mauza Chur Daiya, but the Subordinate Judge and the District Judge came to the conclusion that it had not been proved that any part of the lands of the *taluk* were situated within Mauza Chur Daiya.

For many years the northern part of Mauza Chur Daiya (including the defendant's *howlas*) has been submerged by the Maskata River, which bounded the *mauza* towards the north.

Recently the lands in dispute, which are admittedly within the

Mauza Chur Daiya; were reformed. They are not yet fit for cultivation. Upon their reformation these lands were taken possession of by the defendants. The plaintiff on his part laid claim to them, and on the 27th May, 1919, with certain other formal parties, filed a suit for recovery of possession in the Court of the Subordinate Judge of Barisal.

In his plaint the plaintiff stated his title as *semindar* and alleged that his *semindary* included the Mauza Chur Daiya.

The plaintiff further alleged that no right could accrue to the defendants in respect of the disputed lands, that during the settlement measurement of 1903 the entire lands of the defendants' *howlas* were found intact, and that the disputed land was the *khās* land appertaining to the plaintiff's Taluk Adinath Roy included in their *semindary*.

The plaintiff then claimed by way of relief that a decree for possession might be passed in favour of the plaintiff upon establishment of his right to hold *khās* possession of the land in suit and that the defendants might be evicted therefrom.

The defendants in their written statement denied that there was any *taluk* called Adinath Roy in Chur Daiya, and alleged that the disputed lands were reformations on the original sites of their *howlas*.

A commissioner was appointed to hold a local enquiry, and his report was made on the 24th June, 1921. He came to the conclusion that there was no proof that the disputed land formed part of the Taluk Adinath Roy. He prepared a map upon which he showed the boundaries of the defendants' *howlas* as indicated in the Settlement Record of 1903, and he drew the conclusion that a small portion of the disputed lands marked A on his map, being the extreme south-west corner of such lands, was part of the defendant's *howlas*, and that except to this extent it could not be said that the disputed lands were included in the defendants' *howlas*.

The matter came to trial before the Subordinate Judge, and on the 22nd September, 1921, he dismissed the suit. The learned Subordinate Judge called attention to the contention of the plaintiff that he as *semindar* was the owner of the entire *mouzas* and as such entitled to get possession of every bit of land save and except the small quantity which might be found to appertain to the defendants' *howlas*. He did not, however, deal with this contention, but held that the plaintiff had not proved that the

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lands in dispute formed part of Taluk Adinath Roy and dismissed the suit.

The plaintiff appealed, and in his grounds of appeal made it clear that he was claiming the lands in dispute in *semindary* right as well as in *taluki* right in respect of Taluk Adinath Roy.

On the 8th March, 1923, the District Judge reversed the Subordinate Judge and decreed in the plaintiff's favour recovery of possession of the lands in dispute, except the small portion marked A on the Commissioner's map. This portion the plaintiff no longer claimed.

The District Judge held that it was not shown that the *howlas* of the defendants were nearly co-extensive with the total area of the *mouza*, i. e., so as to include the lands in dispute other than the portion marked A on the Commissioner's map, and that it was not conclusively shown, though it was probable, that lands of Taluk Adinath Roy were included in the *mouza*. He then pointed out that the plaintiff was *semindar* of the *mouza*, and, as far as the suit was concerned, was suing as such, and held that the burden of proof lay on the defendants to show that the disputed lands were within their *howlas*.

The defendants appealed to the High Court, and on the 9th July, 1925, the High Court delivered judgment dismissing the appeal.

The defendants obtained leave to appeal to His Majesty in Council, and appealed accordingly.

It was but faintly contended before their Lordships' Board that if the plaintiff was entitled to rely upon his title as *semindar*, the result of the suit, having regard to the findings of the District Judge, could be other than it was before the High Court. The plaintiff's title as *semindar* is not questioned. The lands in dispute are admittedly within the ambit of the *semindary* and the defendants have failed to prove (except in respect of the portion marked A) that the lands are within their own *howlas*. In their Lordships' judgment, upon such a state of facts the plaintiff must succeed.

It has, however, been urged by the defendants that the only case raised by the plaintiff in his plaint was one based upon his ownership of the *taluk*, and that therefore he is not entitled to succeed in his *semindary* title if he has failed (as admittedly he has) to establish his *taluki* title.

In their Lordships' judgment, the plaint was intended to raise the case of *semindary* title, as well as that of *taluki* title,

and the point which was before each of the Courts below is open to the plaintiff before their Lordships' Board. Even if, however, the plaint be regarded as ambiguous, all doubt as to its meaning was set at rest when the matter came before the Subordinate Judge. Before him the case of *semindary* title was raised, and from that time onward that aspect of the case was kept well to the front. If the defendants were originally misled by the language of the plaint and desired an opportunity of calling further evidence directed to the case of *semindary* title, it was their duty to make their application at the earliest possible moment. No such application was in fact made, and it may well be because there was not available any material beyond that already before the Court. It is now too late, in their Lordships' opinion, for the defendants to rely upon any alleged ambiguity in the plaint.

In the result, therefore, their Lordships are of opinion that the judgment of the High Court was right and that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the costs of the appeal

*Downer & Johnson* : Solicitors for the Appellants.

*W. W. Box & Co.* : Solicitors for the Respondent.

A. T. M.

*Appeal dismissed.*

PRESENT : *Lord Atkin, Sir John Walker, Sir George Lowndes  
and Sir Binod Mitter.*

MAHANT BASDEVA NAND GIR.

v.

MAHANT SHANTANAND GIR.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT  
ALLAHABAD.]

*Mahant*—Appointing another, as *Mahant*—Appointee relinquishing his office—  
Original *Mahant* resuming his office—Original *Mahant* appointing another  
as successor—Appointment, if valid—Delegation to act during absence by  
deed—Deed, construction of.

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v.  
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Mahant Shantanand  
Gir.

In March, 1917, G, a Mohunt, purported to appoint as Mohunt one N, and on 21st November 1917, by a formal deed N purported to relinquish his office. He expressed his intention of retiring from the disciples and leading the life of an ordinary householder. G then took his place again as Mohunt.

In August, 1918, G, as Mohunt, appointed as his successor the present plaintiff, one S, but in October, 1918, the latter executed a document which ran as follows: "I am not conversant with the customs and have no insight into the management of the *ilaga* appertaining to the *guddi*, and there may be ill consequences to the Matt. On account of the affairs of the *gaddi*, I cannot prosecute my studies well. It is also my intention that I should sever my connections with it and pass my days for sometime outstation and prosecute my studies and acquire the qualifications of a *guddinashin* Mohunt. Therefore I return to my Gurm Swami G all the powers which I had acquired under the document dated the 3rd August, 1918 for good management of the *guddi* and the *ilaga* appertaining thereto. My Gurm Swami G shall have right (*hag*) to exercise at present and also in future all the powers which he used to exercise before as Mohunt *guddinashin*. I shall have no objection till I acquire full literary qualifications and the qualifications to make management and those of a *fagir* (ascetic) as required for the *guddi*."

In September, 1919, G, in the absence of S, the respondent, who was still pursuing his studies abroad appointed the defendant appellant B as Mohunt.

It was contended that on the appointment of N as Mohunt, G's functions to appoint anybody had ceased:

*Held*, that this point was not open to the appellant to raise before their Lordships as it was not made in the Court below, as no issue was directed in respect of it and as it depended or might depend, very largely upon questions of fact, upon the nature of the custom of the Matt, and upon the conduct of the disciples of G, N and every body else after the deed.

Their Lordships, at present were of opinion that the deed of 1917 was effective to transfer to G the Mohuntship and the property and that N in executing it meant, before he resigned, to transfer the spiritual rights and the temporal rights to G, and effectively did so.

*Held further*, that S was validly appointed.

That by the deed of October, 1918, S desired to remain Mohunt, that he was absenting himself for a time and that he was for the time appointing a delegate to act for him in his duties during his absence.

Privy Council Appeal No. 75 of 1928 by the Defendant.

The material facts appear from the judgment of their Lordships.

*Upjohn K. C.* and *Dube* for the Appellant.

*Dunn K. C.* and *Hyam* for the Respondent.

The judgment of their Lordships was delivered by

**Lord Atkin**: This appeal comes before the Board on appeal from the High Court of Judicature at Allahabad. It is a suit

*June, 28.*

which raised the question as to who was entitled to the Mahantship of the Math Baghambari at Allahabad, and the question arises in respect of transactions which commenced in the year 1917. At that time there is no question but that the Mahant properly appointed and duly installed was a man named Gyananand. In March, 1917, he purported to appoint as Mahant a man named Narayan, and on November 21st, 1917, by a formal deed Narayan purported to relinquish his office. He expressed his intention of retiring from the disciples and leading the life of an ordinary householder. As far as Gyananand is concerned and as far as the disciples of Narayan are concerned, the effect of that transaction was that Narayan disappeared and that Gyananand took his place again as Mahant.

In August of 1918, Gyananand, as Mahant, appointed as his successor the present plaintiff, one Shanta Nand, and no question is raised but that, if Gyananand was Mahant at that time, the appointment of Shanta Nand was an effective appointment.

But in October of 1918 Shanta Nand executed a document upon which this case appears to turn. There are two views possible in respect of it. One is that Shanta Nand expressed his intention of withdrawing from Allahabad for a period sufficient to enable him to improve his education, increase his religious knowledge, and become qualified to deal with the affairs of the Math, and that he appointed Gyananand to act as his deputy. The other view is that Shanta Nand abdicated entirely from the position of Mahant and either did or did not—it is not quite clear on the contention—appoint Gyananand to be his successor. But in any case, if he had entirely withdrawn and abdicated, it has not been suggested that he was reappointed, and therefore he would have no title to sue as Mahant and his action would come to an end.

In September of 1919, Gyananand in the absence of Shanta Nand, who was still pursuing his studies abroad—that is to say, away from Allahabad, appointed the defendant Basdeva. But within a short time he seems to have been dissatisfied with Basdeva and, in pursuance of a power which he appears to have reserved for himself in the deed under which he appointed Basdeva, he cancelled the appointment and deposed Basdeva for misconduct. Nevertheless, Basdeva remained in possession, and it is against him that this action is brought.

Counsel for Basdeva, feeling that he would have a difficulty, in view of the argument which he had to adduce to destroy the

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plaintiff's title, in saying that Basdeva had got any better title, relies upon the weakness of the plaintiff's title rather than on the validity of any title of his own.

The two points that have been raised before the Board are these: It is said, in the first place, that Narayan had been appointed, validly appointed, Mahant by Gyananand, and it is said that thereupon Gyananand's functions to appoint anybody had ceased; he was *functus officio*. It is said that Narayan, by the deed which he executed of the 21st November, 1917, merely relinquished his office and relinquished his right to the property, but did not in fact make any effective appointment of a Mahant. The consequence would appear to be, if that were true, that from that date there never has been a properly-appointed Mahant or anybody, in fact, entitled to the property of the Math—a very serious position and one which would require very careful consideration before a Court arrived at that conclusion. But it is sufficient for their Lordships to say that that point does not appear to be open to the defendant, the appellant. It was not made in the Court below; there is no issue directed in respect of it, and it seems obvious that that is a point that would have to be raised and very carefully considered, and would depend, or might depend, very largely upon questions of fact, upon the nature of the custom of the Math, and upon the conduct of the disciples Gyananand, Narayan, and everybody else after this supposed deed. There is no trace of its having been argued in the High Court of Allahabad either before the first Judges before whom the appeal came or before the learned Judges on the Letters Patent appeal, and it is not even raised in the appellant's case. Their Lordships have no doubt whatever that in those circumstances this point is not one which is open to the defendant to raise before them. But, in saying so, lest it should be supposed they entertained any doubt as to the Mahantship and its property after Narayan had executed this deed, their Lordships think it proper to say that, on their view of the deed, as at present advised, they are of opinion that the deed was effective to transfer to Gyananand the Mahantship and the property, and that Narayan in executing it meant, before he resigned, to transfer the spiritual rights and the temporal rights to Gyananand, and effectively did so. That is the proper construction of the deed.

Leaving this contention aside, it is clear that when Shanta Nand was appointed, Gyananand was the Mahant, and Shanta Nand was therefore validly appointed.



The question that remains, therefore, is the construction of the document of the 9th October, 1918. There have been different translations of that document; but taking the official translation as put before the Board, which has been slightly amended by one of the learned Judges (and everybody appears to be content to take the document with the amendments made by that learned Judge) it appears to their Lordships that the view taken of it by the learned Subordinate Judge and by the members of the High Court on the Letters Patent appeal is the correct view, and that the Chief Justice has expressed accurately the true reasons for arriving at the construction which he eventually adopted. On the evidence, the right view is that this document is a *bona fide* document. It expresses the real intentions of the person who executed it, Shanta Nand, the then Mahant. It recites that he is not conversant with the customs and had no insight into the management of the *ilagas* appertaining to the *gaddi*, and that there may be ill consequences to the Math in consequence. He says also that, on account of the affairs of the *gaddi*, he cannot prosecute his studies well. The translation goes on to say:—

“It is also my intention that I should sever my connection with it and pass my days for some time outstation and prosecute my studies and acquire the qualifications of a *guddi-nashin* Mahant. Therefore I return to my *guru* Swami Gayananand Giriji Maharaj all the powers which I had acquired under the document mentioned above, dated the 3rd of August, 1918”—that is, the document of appointment—“for good management of the *gaddi* and the *ilagas* appertaining thereto. My *guru* Swami Gyananand Giriji shall have right (*haq*) to exercise at present and also in future all the powers which he used to exercise before as Mahant *gaddi-nashin*. I shall have no objection till I acquire full literary qualifications and the qualifications to make management and those of a *fagir* (ascetic) as required for the *guddi*.”

It appears to their Lordships, when that document is read in light of the circumstances under which it was executed, that there can be no real doubt that the meaning to be put on the document is that adopted by the High Court. In other words, Shanta, having been appointed to this high office with all its advantages, spiritual and temporal, had no intention of laying down the office entirely. He was not retiring altogether with the expectation, which might be well founded or not, that if he were to return, he might in the future be fortunate enough to be, by somebody who was Mahant at that time, reappointed Mahant.

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On the contrary, every phrase in it, if full effect be given to it, seems to indicate that he desired to remain Mahant, that he was absenting himself for a time—an occurrence which their Lordships understand is a common occurrence among Mahants—and that he was for the time appointing a delegate to act for him in his duties during his absence. That intention seems to be made plain by all the words, which seem to point to a mere temporary absence and to his intention to remain as Mahant.

For these reasons it appears to their Lordships that they have no reason to differ from the view taken by the Chief Justice and Mr. Justice Dalal, and that this appeal should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

*T. L. Wilson & Co* : Solicitors for the Appellant.

*Barrow, Rogers & Nevil* : Solicitors for the Respondent.

A. T. M.

*Appeal dismissed.*

## CRIMINAL REFERENCE

*Before Mr. Justice Graham, and Mr. Justice Lord Williams.*

CRIMINAL

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August, 6, 7.

EMPEROR

v.

BALAI GHOSH AND ANOTHER.\*

*Reference—Criminal Procedure Code (Act V of 1898), Sec. 307—High Court, what to consider—High Court, when interferes with the verdict of the jury—Confession, retracted, if can be given effect to—Confession promptly withdrawn—Criminal Procedure Code, Sec. 103, object of—Police officer making the search, called as a witness—Respectable inhabitant.*

Under section 307 of the Code of Criminal Procedure, the High Court has to consider the entire evidence, and to decide after giving due weight to the opinion of the Sessions Judge and the jury, whether the charge was made out against the accused, and whether the verdict was right or not. It is not the practice of the High Court to interfere with the verdict of a jury unless it is shown that the verdict was manifestly wrong and that there were no sufficient materials to justify it.

\* Jury Reference No. 31 of 1929 by R. K. Mitra Esq., Additional Sessions Judge of Burdwan, dated the 17th March, 1929.

There is nothing to prevent a confession although retracted, from being given effect to as against the maker. But where the confession has been retracted, the general rule is that independent corroboration of the confession should be required in order that the Court may be satisfied that the confession is true.

In view of the fact that confession was promptly withdrawn when the accused came before the Committing Magistrate, it will not altogether be safe to rely entirely upon it in the absence of any independent evidence to corroborate it.

The object of section 103 of the Code of Criminal Procedure is presumably to obtain as reliable evidence as possible of the search, and to exclude the possibility of any concoction, or malpractice of any kind.

There can be no harm in the Police officer, who made the search, being called as a witness at the trial, but an officer who is connected with the investigation cannot be deemed to be an entirely satisfactory witness for the purpose of proving the search. It is incumbent upon the Police, at any rate, to make some attempt to comply with the provisions of section 103 of the Code of Criminal Procedure. It is possible that there were no persons living near the place of occurrence who would fulfil the definition of respectable inhabitants used in the section. In that case some evidence to that effect should be given.

Reference under section 307 of the Code of Criminal Procedure.

The material facts are stated in the following  
Reference.

"I have the honour to submit herewith U/S. 307, Criminal Procedure Code, the record of the case, noted in the margin, to the Hon'ble High Court as I am clearly of opinion that it is necessary for the ends of justice to make this reference.

"2. The prisoners, Bolai Ghosh, and Motleb Sheikh were charged U/S 395 Indian Penal Code with committing dacoity in the house of Satya Bala Jeleni. By a majority of 4 to 1 the jury returned a verdict of "not guilty" in favour of two accused giving them the benefit of doubt. I am clearly of opinion that the majority verdict is erroneous and is wholly against the weight of evidence.

"3. The facts of the case have been fully stated in my charge to the jury and I would respectfully solicit a reference thereto.

"4. There is, in my opinion, no doubt upon the evidence that the house of Satya Bala Dasi was raided by dacoits in the manner alleged. Satya Bala and her father Fakir Jelia are eye-witnesses to the occurrence. Satya Bala identified accused Motleb Sheikh, and Fakir Jelia identified accused Balai Ghosh in Kalna Sub-Jail, where a test identification parade was held under the supervision of a Sub-Deputy Magistrate (P. W. 3). Both Bolai Ghosh and Motleb Sheikh made confessional statements before the Sub-Divisional Officer, Kalna. They implicated each other in their confession. It

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is true that the confessions have been retracted, but regard being had to the evidence and circumstances, I have no doubt in my mind that the confessions are true and were voluntarily made. Simultaneous house searches were made by the police at Bagnapara and other villages and certain stolen articles (Ex. IX to XII) were recovered from the house of Balai Ghosh after search. Accused Balai Ghosh's statement that the articles were not found in his house and were produced by the daroga from his pocket cannot be said to be true. There is no room for doubt upon the evidence that both Satya Bala and her father Fakir Jelia were present when the occurrence took place. I believe Fakir Jelia when he says that at the instance of the Chowkidar (P. W. 7) he stated in the F. I. R. (Ex. 7) that he was not in Satya Bala's house when the dacoity was committed. This is no doubt denied by the Chowkidar, but having regard to the evidence and circumstances I am of opinion that the evidence given by Fakir Jelia should be accepted in preference to that of the Chowkidar. The Chowkidar is not a reliable witness and has evidently suppressed the truth.

"5. Upon these considerations I am of opinion that accused Balai Ghosh and Motleb Sheikh are guilty U/3 395 Indian Penal Code, and the jury should have unanimously returned a verdict of guilty of the offence with which they were charged."

*Mr. Debendra Narain Bhattacharyya* for the Crown.

*No one* for the Accused.

The following judgments were delivered :

August, 7.

**Graham, J.**—This is a Reference under section 307 of the Code of Criminal Procedure by the Additional Sessions Judge of Burdwan in connection with a dacoity case which was tried by him in which the jury by a majority verdict of 4 : 1 were of opinion that the accused were entitled to the benefit of the doubt. The learned Additional Sessions Judge being of opinion that the verdict was erroneous and wholly against the weight of evidence has referred the case to this Court.

Under the provisions of section 307 of the Code we have to consider the entire evidence, and, to decide after giving due weight to the opinion of the Sessions Judge and the jury, whether the charge was made out against the accused, and whether the verdict was right or not. It has not been the practice of this Court according to the trend of decisions on the subject to interfere with the verdict of a jury unless it is shown that the verdict was manifestly wrong and that there were no sufficient materials to justify it.

The evidence which was adduced in this case by the prosecution consisted of (1) confessions made by each of the accused Balai Ghosh and Motleb Sheikh, of their guilt, these confessions having been subsequently withdrawn in the Committing Court : (2) the evidence of Satya Bala Dasi and her father Fakir Jelia, who have deposed as eye-witnesses to the dacoity, and have each of them identified one of the accused, Satya Bala having identified Motleb Sheikh and her father having identified the other accused Balai Ghosh, (3) thirdly in addition to this evidence there is, as against the accused Balai Ghosh, the evidence that certain ornaments or pieces of ornaments, Exhibits IX to XII, were found on search in his house.

Now so far as the confessions are concerned there is nothing to prevent a confession although retracted from being given effect to as against the maker. But where the confession has been retracted the general rule is that that independent corroboration of the confession should be required in order that the Court may be satisfied that the confession is true. In view of the fact that both these confessions were promptly withdrawn when the accused came before the Committing Magistrate we think that it would not be altogether safe to rely entirely upon them in the absence of any independent evidence to corroborate them. It becomes necessary therefore to examine the evidence in order to see how far the confessions are corroborated.

A very important part of the case consists of the evidence of Satya Bala Dasi and her father Fakir Jelia, and in that connection the crucial point is whether Fakir Jelia was in his daughter's house on the night of the dacoity. If these witnesses have spoken the truth, and if their identification of the two accused is accepted, then this would undoubtedly furnish valuable corroboration of the truth of the confessions. But the evidence in the case and the facts and circumstances seem to give rise to the considerable doubt as to whether Fakir was at the place of occurrence on the night in question, as he alleges. In the First Information, which he lodged before the police at 8-30 A. M., on the 19th March, 1928, he stated that he was not in his daughter's house when the dacoity took place, and he gave an account of the dacoity which purported to be as described to him by his daughter ; and further he concluded by saying that he had come to his daughter's house at noon on the day following the dacoity, and having heard the details of the occurrence he had come to the Thana to give information. In view of the explicit statement by Fakir Jelia that he was not present

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at the time of the dacoity it is difficult to accept his statement in evidence that he was there and saw what took place. The explanation which he has given for this change in his story is that on the way to the Thana the Chowkidar told him to inform the Daroga that he (Fakir) had not been in his daughter's house at the time of the dacoity. Now the Chowkidar Moti Chang is a man aged about eighty years and it is difficult to imagine any reason why he should have given any such instruction to the informant. The learned Sessions Judge seems to have been of opinion that the Chowkidar was not a reliable witness and had suppressed the truth. There does not however seem to be any sufficient ground for such a conclusion.

There is one significant fact in connection with the question, which as I have said is a very important question, as to whether Fakir was or was not present at the time of the dacoity, and that is the delay which took place in the lodging of the First Information. The occurrence took place at midnight on the 17th March and the First Information was not lodged until 8-30 A. M., on the 19th March, the Police Station being about 14 miles distant from the place of occurrence. If Fakir was present at the time of the occurrence it seems to be hardly probable that he would not have lodged the information sometime during the course of the following day, especially in view of the fact that he is not alleged to have been injured in any way. Dacoity is a serious matter, and, if he was there as alleged, the natural course would have been to lose no time in going and giving information to the Police. On the other hand the delay in lodging information is consistent with the other version that Fakir was not present at the time of the occurrence, and that he came on the following day about midday after hearing of the dacoity, and then having learnt the particulars went to the Thana. There is therefore considerable doubt whether Fakir Jelia really was a witness of the occurrence, and although there is the evidence of witnesses who speak to his presence, in view of his own clear statement in the First Information that he was not there, and the circumstance to which I have referred above which supports that statement, the only conclusion possible appears to be that he did not see the dacoity, and that he has been introduced as an eye-witness for obvious reasons. If that view is accepted then of course it materially affects the evidence of Satya bala Dasi also, because she has throughout described her father as having been present and has given details of what he did. If those statements are untrue, no reliance can safely be attached to her evidence as a whole.

Then in connection with the identification of the accused there is the fact that it is mentioned in the First Information that the dacoits were Malkocha and Galpatta, and that being so their identification would naturally be a matter of extreme difficulty.

As regards the accused Balai Ghose there is the further evidence as to certain ornaments and pieces of ornaments, which are alleged to have been found at his house. With regard to this part of the case it seems to me that the evidence as to the house search is not altogether satisfactory. The section of the Criminal Procedure Code relating to such searches is section 103 which lays down that before making a search the officer about to make it shall call upon two or more respectable inhabitants of the locality to attend and witness the search. The object of the section is presumably to obtain as reliable evidence as possible of the search, and to exclude the possibility of any concoction, or malpractice of any kind. In this instance the witnesses who have been examined to prove the search are the Sub-Inspector of Police, witness No. 12 for the prosecution, and a witness named Probodh Chandra Gossain, witness No. 11 for the prosecution, who is described as a cultivator. There can of course be no harm in the Police Officer, who made the search, being called as a witness at the trial, but an officer who is connected with the investigation cannot be deemed to be an entirely satisfactory witness for the purpose of proving the search. It was incumbent upon the Police to, at any rate, make some attempt to comply with the provisions of the section. It is possible that there were no persons living near the place of occurrence who would fulfil the definition of respectable inhabitants used in the section. In that case however some evidence to that effect ought to have been given. Furthermore it appears that although two persons apart from the Sub-Inspector were called as witnesses to the search, and though these persons signed the search list, only one of these persons was called as a witness at the trial. No explanation appears to be forthcoming of the omission to examine the other witness and there can be no doubt that it was the duty of the prosecution to produce him as a witness at the trial.

Taking the evidence as a whole and taking into consideration all the facts and circumstances it seems to me that a reasonable doubt does arise as to the guilt of the accused, and that it cannot be said that the Jury were not justified in giving

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the benefit of that doubt to the accused. Certainly it cannot be said that their decision was in any sense perverse.

The result therefore is that this Reference must be rejected and the accused are acquitted and released.

Lort-Williams, J:—I agree.

A. T. M.

*Reference rejected: Accused acquitted.*

## APPELLATE CRIMINAL

*Before Mr. Justice Cuming and Mr. Justice  
Lort-Williams.*

SREEHARI SWARNAKAR

v.

EMPEROR.\*

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*Evidence—Evidence Act (1 of 1872), Sec. 6.—Statement of mother as to what her child said.*

The statement of the girl's mother as to what the girl said is not evidence of the fact that she was bitten by a leech. It could possibly be used to corroborate or to contradict the statement made by the girl. By itself it would not be a substantive evidence of the fact that she had been so bitten. The statement was not relevant under section 6 of the Evidence Act.

Appeal by the Accused under section 410 of the Code of Criminal Procedure.

The material facts appear from the judgment.

*Mr. Sachindra Kumar Ray* for the Appellant.

*Mr. Bireswar Chatterjee* for the Crown.

The following judgments were delivered :

Cuming J. : This is an appeal by one Sreehari Swarnakar who was tried by the learned Sessions Judge of Dinajpur sitting with a jury on a charge of rape on a child of some 8 or 9 years old. The jury unanimously found the accused guilty and the learned Judge agreeing with verdict sentenced him to five years rigorous

\*Criminal Appeal No. 96 of 1929, against the decision of H. G. William Esq., Sessions Judge of Dinajpur, dated the 8th January, 1929.



imprisonment and 16 strokes. The facts are briefly these. The girl who was raped named Durgamani was living with her mother one Sailabala who is a widow. On the day of occurrence the mother of the accused came to call Durgamani to collect firewood with the accused who was also collecting firewood. Durgamani went with the accused to a place called Puranbhita where they began to collect firewood. While the girl was engaged in collecting wood the accused Sreehari caught hold of her, placed her on the ground and proceeded to have sexual intercourse with her. Finally he let her go and the girl went back weeping to her mother to whom she told the matter. After some delay information was given to the authority and the appellant was put on his trial with the result already mentioned.

The appellant pleaded not guilty and it was suggested that the charge was the result of enmity. It was further suggested that the injury on the girl was due to the bite of a leech. The first point urged by the learned Vakil for the appellant is that the learned Judge misdirected the jury by telling them that there was no evidence that the girl had been bitten by a leech beyond the doctor's statement, that it was possible that the wound on the girl was caused by the biting of a leech. The learned Vakil contends that there is a statement by the girl's mother that the girl said that she had been bitten by a leech. The learned Judge was quite correct in saying that there was no evidence that the girl had been bitten by a leech beyond the doctor's statement. The statement of the girl's mother as to what the girl said is not evidence of the fact that she had been bitten by a leech. It could possibly be used to corroborate or to contradict the statement made by the girl. By itself it would not be substantive evidence of the fact that she had been so bitten. The learned vakil contends that under section 6 of the Evidence Act her statement to the mother would be a relevant fact. Section 6 provides as follows "Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places." It is clear that the statement of the girl to her mother, if she had made any, did not form part of the transaction by which I understand the raping of the girl or occur during it. This transaction, namely, raping of girl was over when the perpetrator had gone away and the girl came away from the scene of occurrence to her mother's house. Therefore this statement is not relevant under section 6. Even then it would not be evidence

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of the fact that she had been bitten by a leech. It could only be evidence of the fact that she made that statement to her mother. There is therefore no misdirection by the learned Judge on this point.

The learned vakil then contends that the learned Judge did not tell the jury that the statement to the mother could be used to contradict the girl, and that the learned Judge should have specifically drawn the jury's attention to the statement. As a matter of fact the jury's attention was drawn to the fact that the mother had said that the daughter told her that she had been bitten by a leech. The jury themselves specifically questioned the girl on the point, for at the end of her cross-examination there is a note "To the jury. It is not true that when I came home after the occurrence I told my mother that I had been bitten by a leech. I told my mother that I had been raped by accused" Therefore although the learned Judge did not in his charge specifically draw the attention of the jury to this point the jury's attention had been drawn to it as is clear from the girl's answer quoted above. Therefore the omission on the part of the learned Judge to draw specifically the jury's attention to the point is of no importance.

It has next been argued that the mother Sailabala admitted in her cross-examination that since a certain *salis* she did not allow the accused to come to her house and the learned vakil suggests that the Judge should have put to the jury whether it is likely that in such circumstances the girl would be allowed to go with the accused. The learned Judge did draw the attention of the jury to the fact that there was enmity between the parties. He did not no doubt specifically suggest to the jury that they might consider the question as to whether, if there was any enmity between the parties, the girl would have gone with the accused to gather wood. No doubt the Judge might have put this point to the jury. But I do not think that the putting of this point specifically to the jury is of much importance when the jury's attention was drawn to the fact that there was enmity between the parties.

Then it is urged that the learned Judge should have drawn the attention of the jury to the contradiction between the statement of the girl that the place of occurrence was visible from other houses and the evidence of the Sub-Inspector who investigated the case that the actual spot of occurrence was not visible from other houses.

The Sub-Inspector was shown the spot by the child. The

child, no doubt, says that Puranbhita is visible from certain other places. That is not the same as saying the place of occurrence is visible. The actual place of occurrence may be somewhere inside the Puranbhita. There is no contradiction between the girl's statement and that of the Sub-Inspector. The girl was not asked whether the place on which she was visible from other houses.

Last ly it has been urged by the learned vakil for the appellant that the sentence is too severe.

Looking at the facts of the case we are not prepared to say for one moment that the sentence is severe. The rape has been perpetrated on a child of nine. In such cases infliction of whipping is a very suitable form of punishment in addition to the sentence of imprisonment.

The result is the appeal is dismissed. The accused, if on bail, must surrender to serve out his sentences.

Lort-Williams J. : I agree.

A. T. M.

*Appeal dismissed.*

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## CRIMINAL REVISION.

*Before Sir George Claus Rankin, Knight, Chief Justice, and  
Mr. Justice Patterson.*

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THE CORPORATION OF CALCUTTA.\*

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*Demolition of structure—Calcutta Municipal Act (III B. C. of 1923), Sec. 363—  
Structure, when made—Disbelieving owner's evidence—Calcutta Municipal  
Act as amended by Act V B. C. of 1926, Sec. 557A. Cl. (4)—Time  
limit.*

In a proceeding for demolition of a structure it was contended that under Sub-section (2) of section 363 of the Calcutta Municipal Act that the question before the Magistrate was not whether the Corporation had shown the date of the

\* Criminal Revision Nos. 793 and 794 of 1929, against the orders of the Municipal Magistrate of Calcutta, District I & III, dated the 18th May, 1929.

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work being done or that the date was within 5 years of the institution of the proceedings but whether the owner had established to his satisfaction that the work had been done more than 5 years previously :

*Held*, that the Magistrate was justified in refusing to be satisfied with the evidence of the owner to the effect that the work was done more than 5 years from the date of the proceeding : that from the materials before him, the Magistrate was entirely justified in finding that the structure in question was newly made within the period of 5 years prescribed by sub-section (2) of section 363.

The occupier of the premises was made a party to the Magistrate's proceedings on the 17th January, 1928. It was contended that under the Amending Act V B. C. of 1926, Cl. (4) of section 557 A of the Calcutta Municipal Act, a limitation of one year was put from the date of the commencement of the Act to the time within which proceedings might be taken against the party :

*Held*, that unless the occupier showed that the structure was erected before the 17th January, 1923, he was not protected by any time limit imposed by the Act.

Clause (4) of section 557A of the Calcutta Municipal Act does not mean that no legal proceeding under section 557A is ever to be taken after the expiry of one year from August, 1926. What it says is that if under the Act or any other law, a lawful proceeding between August, 1926, and August, 1927, would have been barred, it is not to be barred until August 1927.

The effect of Cl. (4) of section 557A of the Calcutta Municipal Act is that between August, 1926, and August, 1927, even although 5 years had expired, a legal proceeding would have been competent because the clause is intended as an extension of limit in view of the fact that legal proceedings were not possible effectively for some considerable period prior to the Amending Act.

Applications for Revision under section 435 of the Code of Criminal Procedure.

The petitioners were convicted and sentenced under section 449 of the Calcutta Municipal Act in proceedings for demolition of structures, read with the Amending Act V B. C. of 1926.

*Messrs. K. N. Chaudhuri, Suresh Chandra Taluqdar and Kanaiadhan Dutt* for the Petitioner in No. 793.

*Messrs. Suresh Chandra Taluqdar and Kanaiadhan Dutt* for the Petitioners in No. 794.

*Messrs. D. N. Bagchi and Gopendra Krishna Banerjee* for the Opposite Party.

The following judgments were delivered :

*No. 793.*

**Rankin, C. J. :**—In my opinion, this Rule should be discharged. The order complained of is an order directing demolition of certain structures mentioned in the order under the headings (a), (b), (c) and (d). The contention before us is, first, that so far as (d) is concerned the Rule is not pressed. So far as (c) is

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concerned, it is conceded that there is some evidence before the Magistrate to show that the structures were raised within five years from the date of the present proceedings. So far as (a) and (b) are concerned, the contention of the learned Counsel on behalf of the applicant is that there is no specific evidence on the part of the Corporation to show that these structures were erected within five years of the present proceedings and that the Magistrate should have been satisfied with certain evidence called by the owner to the effect that the structures were erected more than five years from the date of the proceedings. Another ground is taken to the effect that the whole proceedings before the Magistrate were bad because they were instituted upon a complaint made by Mr. C. K. Chatterji and that under section 200 Criminal Procedure Code it was necessary that Mr. Chatterji should be examined, and on this point reference has been made to a decision of this Court in the case of *Ambika Prasad Das v. The Corporation of Calcutta* (1).

As regards the question of the age of the structures the provision of the Calcutta Municipal Act is clear. Sub-section (2) of section 363 is as follows :—"Notwithstanding anything contained in Sub-section (1), no proceeding shall be instituted thereunder in respect of any work which has been done more than five years before the institution of such proceedings, provided that the onus of proving that the work was done more than five years previously shall lie on the owner." Under this provision it is claimed that the question before the Magistrate was not whether the Corporation had shown the date of the work being done or that the date was within five years of the institution of the proceedings but whether the owner had established to his satisfaction that the work had been done more than five years previously. The Magistrate had dealt in a most painstaking fashion with this question and he has given very good reason, as it seems to me, for refusing to be satisfied with the evidence of the owner to the effect that the work was done more than five years from the date of the proceeding. In my judgment, there were materials before him which entirely justified him in finding, as he has in fact found, that the structures in question were newly made in 1923-24 and therefore are within the period of five years prescribed by the section which I have just referred to.

On the question whether the proceedings are bad by reason that the complainant was not examined under section 200 Criminal Procedure Code the Magistrate contends in his explanation, first,

(1) (1928) 48 C. L. J. 190; 32 C. W. N., 1091.

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that the Magistrate in a case of this sort is not acting with a complaint under the Criminal Procedure Code at all. Whether that view be right or wrong I do not require now to consider. What the Magistrate says is that even if this be taken to be a complaint under the amended Criminal Procedure Code there is no need any longer to have the complainant examined when a complaint is filed by a public servant acting in the discharge of his official duties. Under the Calcutta Municipal Act any Municipal officer is a public servant; but, apart altogether from any express provision, it appears to me plain that if the document referred to is to be treated as a complaint it is a complaint by the Building Surveyor of the Corporation acting as a public servant in the discharge of his official duties.

For these reasons, it appears to me that this Rule must be discharged.

*No. 794.*

This Rule has been obtained at the instance of certain occupiers of the premises referred to in the previous Rule and the only additional ground which requires to be considered is this: It appears that these occupiers were made parties to the Magistrate's proceedings on the 17th of January, 1928. The contention is that under the amending Act V (B. C.) of 1926, clause (4) of section 557A of the Municipal Act puts a limit of one year from the date of the commencement of the Act to the time within which proceedings may be taken in such a case as this against a party. When one comes to examine clause (4) of section 557A one finds that its real meaning is as follows:—When the Calcutta Municipal Act of 1923 was first passed it contained, as afterwards appeared, insufficient provision for a case in which prior thereto an authorised structure had been erected and certain proceedings taken before the General Committee of the Corporation. The new Act applied very well to cases which arose after it was passed but there was no provision which enabled cases which had occurred and been in part dealt with prior to the passing of the new Act to be dealt with under the machinery of the new Act. The object of Act V (B. C.) of 1926 was to enable the new machinery to be applied to cases which had arisen prior to the passing of the Act of 1923. But between the date in 1923 when the Calcutta Municipal Act was passed and the date in 1926 when this amendment was made there was no valid or effective process for taking action with reference to cases of work done prior to 1923. The law being out of action for a certain period it was provided by clause (4) of section 557A as

follows :—"Notwithstanding anything contained in this Act or in any other law, a suit or legal proceeding under this section may be instituted at any time within one year from the commencement of the Calcutta Municipal (Amendment) Act, 1926". We are dealing with a limit of five years. The present applicants were made parties to the proceedings on the 17th of January, 1928, and unless they show that these structures were erected before the 17th of January, 1923 they do not show that they are protected by any time-limit imposed by the Act. The effect of clause (4) to which I have referred is this that between August, 1926, and August, 1927, in a case such as this, even although five years had expired, a legal proceeding would have been competent because the clause was intended as an extension of limit in view of the fact that legal proceedings had not been possible effectively for some considerable period prior to the Amending Act. The clause does not say and it does not mean that no legal proceeding under section 557A is ever to be taken after the expiry of one year from August, 1926. What it says is that if in the Act or any other law a legal proceeding between August, 1926 and August, 1927 would have been barred, it is not to be barred until August, 1927. Such a clause at no time was of any use to anyone except to the Corporation, and that in a case in which it was desired to get an extension of some restrictive period of limitation imposed by some other section of the Act or some other law. In this view of the meaning of the section, it is unnecessary for me to examine further into the objection taken in this case.

The Magistrate has in his explanation contended that "the Corporation does not proceed against the tenants. It is only the Magistrate who has to hear the tenants under Act III (B. C.) of 1923 as well as Act III (B. C.) of 1899. The notices on the tenants can be issued at any time before the disposal of the case." He goes on to cite a ruling of this Court to the effect that the law does not require specifically that a notice should be served on the occupier and that it is for the occupier to move the Magistrate. Whether there is anything in this contention or not, the ground upon which this rule was granted is not made out. The ground was that the order was barred by limitation under section 557A. In my opinion, therefore, this rule must be discharged.

Patterson, J :—I agree.

A. T. M.

*Rule discharged.*

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## APPELLATE CIVIL

*Before Mr. Justice B. B. Ghose, and Mr. Justice S. K. Ghose.*

ABDUL GOFUR MULLA AND ANOTHER

v.

KALIDHAN MONDAL AND OTHERS.\*

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August, 6, 7.

*Deposit—Bengal Tenancy Act (VIII of 1885) Sec. 174—Correct amount not deposited through act of Court—Remedy—Appeal—Order setting aside sale.—Civil Procedure Code (Act V of 1908), Sec. 47.*

When the judgment-debtor deposits the money, if by some mistake a short deposit is made and that deposit is accepted by the Court Official as the correct amount and when the mistake is discovered the judgment-debtor pays in the full amount, the judgment-debtor has complied with the provisions of section 174 of the Bengal Tenancy Act, provided the judgment-debtor establishes that he is prejudiced by the act of the Court and the mistake is attributable to that act; *Chundi v. Banks Bahary* (1). The only thing that can be done in such a case is that at the most he should be made liable to pay interest for a few days that the mistake was not discovered and the money was not paid.

An order under section 174 of the Bengal Tenancy Act does not fall within section 47 of the Code of Civil Procedure: *Sital Rai v. Nanda Lal* (2) dissented from. *Sukh Narain v. Geroke Prasad* (3) followed.

No appeal lies against an order setting aside a sale under section 174 of the Bengal Tenancy Act.

Appeal by the Judgment-debtors, and Application under section 115 of the Code of Civil Procedure.

Application for setting aside sale under section 174 of the Bengal Tenancy Act.

*Messrs. Jogesh Chunder Roy and Jalindra Nath Sanyal* for the Appellants and Applicants.

*Messrs. Awarendra Nath Bose, Kanaidhons Dutt and Phanindra Nath De* for the Auction-purchaser Respondent and Opposite Party.

The following judgments were delivered :

\*Appeal from Appellate Order No. 105 of 1929 with Application, against the order of J. M. Pringle Esq, District Judge of 24-Parganas, dated the 20th December, 1928, reversing that of Babu K. B. Ghose, Additional Subordinate Judge, 24 Parganas, dated the 18th September, 1928.

(1) (1899) 1 L. R. 26 Calc. 449 (459).

(2) (1909) 11 C. L. J. 202, 13 C. W. N. 591.

(3) (1898) 3 C. W. N. 344.



**B. B. Ghose, J:** This is an appeal by the judgment-debtor against an order of the District Judge reversing the order of the Subordinate Judge setting aside a sale in execution of a rent decree on the ground that the judgment-debtor had deposited the amounts necessary under Section 174 of the Bengal Tenancy Act. The facts are these: A decree was obtained by the landlord for about Rs. 2430. The sale was held on the 11th August, 1928 and a third party purchased the property in question for Rs. 5400 and odd. On the 22nd August the judgment-debtor deposited the sum mentioned in the sale proclamation together with 5 per cent of the purchase money and on the 18th September the Court made an order setting aside the sale. It was found afterwards that the amount which was necessary to be deposited for having the sale set aside fell short by Rs. 60 or Rs. 80. The reason for the error apparently was that the judgment-debtor deposited the sum given in the sale proclamation which only was necessary to be deposited if the application fell within Order XX<sup>1</sup>, rule 89 of the Civil Procedure Code. Under section 174 of the Bengal Tenancy Act the judgment-debtor was bound to deposit the entire money which the decree-holder was entitled to recover. The amount which fell short was apparently on account of the interest that had to be calculated since the date of the sale proclamation and the date of deposit. The decree-holder subsequently made an application for review of judgment before the Subordinate Judge and he also preferred an appeal against the order of the Subordinate Judge to the District Judge. The Subordinate Judge refused to reconsider the order setting aside the sale. The learned Judge, however, on appeal preferred by the decree-holder has directed the order for setting aside the sale to be vacated and for confirming the sale. The appeal is preferred against that order of the learned District Judge. It is necessary to state that the auction-purchaser did not appeal against the order of the Subordinate Judge setting aside the sale. In this Court the decree-holder does not appear; the auction-purchaser appears and he takes a preliminary objection to the maintainability of the appeal here. The learned Advocate for the appellant answers by saying that there was no appeal before the District Judge against the order of the Subordinate Judge and he has made an application in the alternative for setting aside the order of the District Judge on appeal on the ground that he had no jurisdiction to entertain the appeal. The same objection was raised by the judgment-debtor before the learned Judge but he overruled the objection on the authority of the case of *Sital Raf v.*

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*Nanda Lal*, (1) and he held that the appeal to him was competent under section 47 of the Code. If the learned Judge was right in his view that section 47 governed the proceedings, then there can be no question that there would be a second appeal. But the learned Advocate for the respondent auction-purchaser contends that this is not a matter falling under section 47 of the Code but there was an appeal before the learned Judge under Order XLIII, rule 1 (j) of the Civil Procedure Code and he relies in support of his contention on the case of *Banshibadan v. Chhannat Bibi* (2). In my opinion, this contention is untenable because the provision of Order XXI, rule 89 has no application to sale under the Bengal Tenancy Act (See section 170 of the Act). The order of the trial Court was not made under Order XXI, rule 92 of the Code on which the case cited was decided. It was made under section 174 of the Bengal Tenancy Act and therefore this argument on behalf of the respondent has no force whatsoever.

We have next to consider whether the matter in question falls within the provision of section 47 of the Code as has been argued on behalf of the appellant that it does not. The case of *Sital Rai v. Nanda Lal* (1) to which the learned District Judge has referred as supporting the proposition that the matter in controversy falls within section 47 of the Civil Procedure Code does not appear to support the proposition in its entirety. What the learned Judges say there is this: "It cannot be affirmed as a general proposition of law either that an order under section 174 of the Bengal Tenancy Act or under section 310 A of the Code of Civil Procedure is or is not appealable. Whether an order made under either of those sections is appealable, must depend upon the circumstances of the individual case before the Court." It seems to me with great respect that the learned Judges proposed a problem in each case to be solved by the Court whenever a question arises under section 174 of the Bengal Tenancy Act with which only we are now concerned. That problem seems to have been solved by the learned Judges in that case and in some other cases by holding that where the decree-holder was the purchaser the matter falls under section 47 of the Code and an appeal lies. That has been held in some cases previous to this and also in subsequent cases. I must add again with the greatest respect that this decision seems to me to be fallacious having regard to the view of the Privy Council in the case of *Prosunno Coomhar Sanyal v.*

(1) (1909) 11 C. L. J. 202, 13 C. W. N., 591.

(2) (1923) 42 C. L. J., 176.

*Kali Das Sanyal* (1). There has however been a series of cases which lay down that rule. In my judgment, an order under section 174 of the Bengal Tenancy Act does not fall within section 47 of the Civil Procedure Code in any case and, in my opinion, the true rule was laid down in the case of *Subh Narain Lall v. Goroke Prosad* (2) although all the reasons stated there do not commend themselves to me. If all proceedings for setting aside a sale are considered to be questions falling under section 47, then by what sort of reasoning can it be said that an order passed under rule 92 of Order XXI of the Code for setting aside the sale on the ground of irregularity, fraud or otherwise is not a question falling under section 47 of the Civil Procedure Code? This, however, has never been contended in any Court nor can it be contended that proceedings under rule 92 of Order XXI can by any stretch of language be brought within the purview of section 47 of the Code. I might have considered it necessary to refer this question to the Full Bench: but having regard to the fact that this question has been solved by the new amendment of the Bengal Tenancy Act, I do not think it necessary to do so. Under the new section 174, subsection 5, an appeal has been allowed against an order setting aside or refusing to set aside a sale. I content myself by following the case *Subh Narain v. Goroke Prosad* (2) referred to above. In my opinion, therefore, the appeal to the learned Judge was not competent and on that ground the order of the learned Judge is liable to be set aside and that of the Subordinate Judge restored.

In disposing of this matter, I may refer to one other fact. This matter of short deposits on account of mistake in calculation is not infrequent. What the parties usually do is to apply to some Court Official to make the calculation as to the amount which it is necessary for them to deposit in order to set aside a sale either under Order XXI, rule 89 of the Civil Procedure Code or under section 174 of the Bengal Tenancy Act. As a matter of practice and it is also to be found in this case, a calculation is made on the back of the petition for execution presented by the decree-holder and the calculation is made with reference to the application. Then Chalang are filed and those chalang are passed by the Sheristader according to the General Rules and Circular Orders, Civil, of this Court. Now, in this case also it was the duty of the Sheristadar to see as to the correctness of the amount to be deposited under Rule 20,

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(1) (1892) L. R. 19 L. A. 166; I. L. R. 19 Calc. 683.

(2) (1898) 3. C. W. N., 344.

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Chapter IX of the Court's Rules, and Circular Orders, (Civil). The Sheristadar in this case signed the challans and evidently he was of opinion that the exact amounts required to be paid to the different parties were deposited by the judgment-debtor. That being so, it seems to me that it falls within the observations of Mr. Justice Jenkins, as he then was, in the Full Bench Case of *Chundi Charan Mandal v. Bunka Behary Lal Mandal* (1) where that learned Judge stated that in order to succeed, the judgment-debtor must establish that he was prejudiced by the act of the Court and that the mistake that was made was attributable to that act. Mr. Justice Jenkins was careful to point out that what constituted act of the Court must depend upon the circumstances of each case. When the judgment-debtor deposits the money if by some mistake a short deposit is made and that deposit is accepted by the Court official as the correct amount and when the mistake is discovered the judgment-debtor pays in the full amount, it would hardly be consistent with common sense or justice to say that the judgment-debtor has not complied with the provisions of section 174 of the Bengal Tenancy Act and that he must lose the property. The only thing that can be done in such a case is that at the most he should be made liable to pay interest for the few days that the mistake was not discovered and the money was not paid. It seems to me to be still worse when the Court of first instance sets aside the sale on the ground that the full amount has been deposited and the appellate Court reverses that decision and deprives the judgment-debtor of his property although the decree-holder has been satisfied in full. The position in this case is again worse because in the lower Court it was the decree-holder who was fighting the judgment debtor. The auction-purchaser was satisfied with his 5 per cent and did not want to take the property. Here the decree-holder is not taking any interest but the auction-purchaser is resisting the appeal and the application for revision. Under these circumstances, the proper order to make is to dismiss the appeal, to allow the application in revision, to set aside the judgment of the lower appellate Court and to restore the order of the Subordinate Judge.

Having regard to the fact that the judgment-debtor gave the wrong rule in his petition under which he professed to deposit the amount of the decree, there will be no order as to costs in any of the Courts, each party bearing his own costs throughout.

S. K. Ghose, J : I agree.

A. T. M. *Appeal dismissed : Order of the first Court restored.*

(1) (1899) I. L. R. 26 Cal. 449 (459)

Before Mr. Justice Page and Mr. Justice Patterson.\*

NARAYAN CHANDRA DUTT

v.

THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS  
OF THE PANIHATI MUNICIPALITY.\*

*Rating—Principle—Bengal Municipal Act (III B. C. of 1884), Secs 85 (b), 101—Proviso—Construction of section of an Act—Assessment ultra vires and illegal—Jurisdiction of Civil Court.*

If the assessment as made be *ultra vires* and illegal, it cannot be sustained, and the plaintiff is entitled to a declaration to that effect: *Chairman, Municipal Board, Chapra v. Barudee* (1)

The meaning and effect of sections 85 (b) and 101 of the Bengal Municipal Act are clear and in accordance with the general principles of rating, and these sections provide that in every case the rate is to be imposed on the annual value of the holding which is deemed to be the gross annual rent at which the holding "may be reasonably expected to let", while the proviso is inserted in aid of the assessment, and to lay down a maxim to prevent excessive assessments being made.

Where no attempt was made to ascertain the value of the holding as provided by section 101 of the Bengal Municipal Act, the Commissioners were acting *ultra vires* in accepting the Valuation Officer's method of valuation "based, as they knew it was, upon a percentage of the estimated cost of the buildings in entire disregard of the principle which they were bound by law to adopt as the basis of their assessment." "The principle of rating upon which the Commissioners are directed to proceed is the same as that which is adopted in England, and similar difficulties arise there in the case of gentleman's parks and mansions which are laid out for residential purposes, and not for letting. But such properties are, nevertheless, constantly rated upon the basis of their annual letting value": *Nanda Lal Bose v. The Corporation for the Town of Calcutta* (2).

No words are to be read into any enactment which are not to be found there and which would alter its operative effect because of provisions to be found in any proviso. A proviso may be used to guide one in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably admit of doubts as to its having this scope or that, what is the proper view to take of it; but to find in it an enacting provision which enables something to be done which is not to be found in the enactment itself on any reasonable construction of it, simply because otherwise the proviso would be meaningless and senseless.

\*Appeal from Appellate Decree No. 2169 of 1929, against the decree of L. B. Chatterjee Esq, 1st Additional District Judge of 24-Perganas, dated the 18th May, 1927, affirming that of Babu Nalini Mohan Bannerjee, Subordinate Judge, 3rd Court of 24-Perganas, dated the 19th June, 1926.

(1) (1910) 1 L. R. 37 Calc. 374; 11 C. L. J. 400.

(2) (1885) 1 L. R. 11 Calc. 275 (281).

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would be in the highest degree dangerous : *West Derby Union v. Metropolitan Life Assurance Society* (1).

Appeal by the Plaintiff.

Suit for a declaration.

The material facts appear from the judgment.

*Dr. Bijan Kumar Mukherjee* for the Appellant.

*Dr. Sarat Chandra Basak* and *Mr. Gopendra Nath Das* for the Respondent.

C. A. V.

The judgments of the Court were as follows :

July, 30.

Page, J. : This is a suit for a declaration that the assessment of a rate under section 85 (b) of the Bengal Municipal Act (III of 1884) of the annual value of the plaintiff-appellant's holding by the Commissioners of the Panihati Municipality was *ultra vires* and illegal.

The decision turns upon the true construction of section 101 of the Act which runs as follows :

" 101. The gross annual rent at which any holding may be reasonably expected to let shall be deemed to be the annual value thereof ; and such value shall accordingly be determined by the Commissioners and entered in the valuation list :

Provided that, except in the Darjeeling Municipality, if there be on a holding any building or buildings the actual cost of erection of which can be ascertained or estimated, the annual value of such holding shall in no case be deemed to exceed an amount which would be equal to seven and a half per centum on such cost, in addition to a reasonable ground-rent for the land comprised in the holding."

It appears that the holding in suit is *debatbar* property held by the plaintiff as shebait. The area of the holding is about 13 bighas, of which half consists of a fruit orchard ; upon 3 Bighas there are 12 Shiva Mandirs, and upon the remainder of the holding stand the three-storied dwelling houses and offices forming the residence of the plaintiff. The property is situate on the east bank of the Hooghly about eleven miles up the river from Calcutta, with a *pucca ghat* leading to the river.

In 1921 for the purposes of a latrine tax imposed under section 86 of the Act the annual value of the holding was assessed under section 96 at Rs. 3750 and in 1924, when the rate in question was imposed under section 85 (b), it is conceded that no separate or

further valuation of the holding was made, and that the assessment was based upon the annual value that had been ascertained for the purpose of the latrine tax in 1921.

Now, the holding in suit is of a similar nature to that of numerous other properties on the banks of the Hooghly that are used as the residences or pleasure houses of prosperous citizens of Calcutta. The plaintiff's son in the course of his evidence at the trial stated that houses of this type in the neighbourhood of the plaintiff's holding rarely were let, and usually were occupied by the owners who had built or acquired them. But there was evidence that specific holdings of a similar nature in the vicinity had been let, and that such properties from time to time changed hands, and passed from one owner to another.

Nevertheless, it appears that in 1921 when the valuation list was prepared no attempt was made by the officer appointed to value the holdings to ascertain the annual rent at which the plaintiff's holding might reasonably be expected to let, or to obtain information as to the cost of the construction of the buildings that had been erected on the holding. All that the Valuation Officer purported to do was to estimate "by guess" what he conceived to be the cost of erecting the buildings that he found on the holding, and to settle the valuation upon the estimate thus made. The Commissioners appear to have accepted the basis of the Valuation Officer's estimate, and the assessment was fixed at 3 per cent on an annual value of Rs. 3750.

If the assessment as made was *ultra vires* and illegal it cannot be sustained, and the plaintiff is entitled to the relief that he seeks : *Chairman, Municipal Board, Chapra v. Basudeo Narain Singh* (1).

On behalf of the respondents it is contended that the assessment can be supported upon the footing that section 101 and the first proviso thereto contain alternative modes of assessment, and that it is open to the Municipality to assess a holding either upon the annual value ascertained as set out in section 101 or upon a percentage basis under the proviso.

In my opinion the construction which the respondents urge upon the Court cannot be accepted. The general rule for construing provisos was explained by the House of Lords in *West Derby Union v. Metropolitan Life Assurance Society* (2) in which case Lord Herschell observed "I decline to read into any enact-

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(1) (1916) 1 L. R. 37 Cal. 374 ; 11 C. L. J. 400.

(2) (1897) A. C. 647.

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ment words which are not to be found there, and which would alter its operative effect because of provisions to be found in any proviso. Of course, a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and shew when there is doubt about its scope, when it may reasonably admit of doubt as to its having this scope or that, what is the proper view to take of it; but to find in it an enacting provision which enables something to be done which is not to be found in the enactment itself on any reasonable construction of it, simply because otherwise the proviso would be meaningless and senseless would, as I have said, be in the highest degree dangerous (1) and Lord Davey added "it seems to me that the whole argument of the appellants really comes to the old and apparently in irradicable fallacy of importing into an enactment which is expressed in clear and unambiguous language something which is not contained in it, by what is called implication from the language of a proviso which may or may not have a meaning of its own" (ibid, p. 657).

The meaning and effect of section 85(b) and section 101, however, in my opinion, is clear and in accordance with the general principles of rating, and these sections provide that in every case the rate is to be imposed on the annual value of the holding which is deemed to be the gross annual rent at which the holding "may be reasonably expected to let," while the proviso was inserted in aid of the assessees, and to lay down a maxim to prevent excessive assessments being made. In the present case no attempt was made to ascertain the annual value of the plaintiff's holding as provided by section 101, and in my opinion the Commissioners were acting *ultra vires* in accepting the Valuation Officer's method of valuation "based, as they knew it was, upon a percentage of the estimated cost of the buildings in entire disregard of the principle which they were bound by law to adopt as the basis of their assessment" [see per Garth, C.J. in *Nundo Lal Bose v. The Corporation for the Town of Calcutta* (2)].

I am not unaware that since *Nundo Lal Bose's* case (2) was decided on February 19th, 1885, by section 151 (b) of the Calcutta Municipal Act (III of 1899) for the purpose of assessing land and buildings to the consolidated rate "the annual value of any building not erected for letting purposes and not ordinarily let shall be

(1) (1897) A. C. 647 (665).

(2) (1885) I. L. R. 11 Cal. 275 (281).



deemed to be "a sum ascertained with reference for a percentage basis on the cost of construction as therein provided, and that since the judgment of Cave and Wills, JJ., in *The Queen v. The School Board for London* (1), delivered on December, 21st, 1885, although "a certain rate of interest on the capital expended in creating the hereditament is by no means to be taken as necessarily equivalent to the rent which a hypothetical tenant would give.....the amount of capital expended is admissible in evidence as a criterion by which to estimate that rent in the case of works like these (i. e., a public reservoir) *which are incapable of being compared with other hereditaments which form the subject of letting.*" Per A. L. Smith, L. J. in *Liverpool Corporation v. Llanfyllin Assessment Committee* (2); see also per Buckley, L. J. in *Liverpool Corporation v. Charley Assessment Committee and Whitnell Overseers* (3); *Metropolitan Water Board v. Chertsey Assessment Committee* (4). No doubt in exceptional cases where the rent that a hypothetical tenant might reasonably be expected to pay for the holding cannot be ascertained by methods which would be efficacious in normal and ordinary cases, for example, where the holding consists of land upon which a railway, a gas work, a catchment area or a building such as the Bodleian Library at Oxford is situate, rough and ready tests alone may be available for ascertaining the annual rent that a hypothetical tenant of the holding might reasonably be expected to pay, but in every case the annual rental value is the basis of the assessment, and in such exceptional cases, as Mr. Ryde points out in his work on Rating (and edition at page 176) a "great part, if not the whole, of the difficulty will disappear if the rule be thus stated; the measure of rateable value is defined by statute as the rent which may reasonably be expected; interest on cost, or on capital value cannot be substituted for the statutory measure, but can be looked at as *prima facie* evidence in order to answer the question of fact what rent a tenant may reasonably be expected to pay."

Now, applying these principles to the facts of the present case I am of opinion that the plaintiff's holding is not to be regarded or treated as though it were of an exceptional or abnormal type, for as Garth, C. J. pointed out "the principle of rating upon which the Commissioners are directed to proceed is the same as that which is adopted in England, and similar difficulties arise there in the case of gentlemen's parks and mansions which are laid out for residen-

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(1) (1885) 55 L. J. M. C. 55, on App. 17 Q. B. D. 738.

(2) (1899) 2 Q. B. 21.

(3) (1912) 1 K. B. 280; (1913) A. C. 197.

(4) (1916) 1 A. C. 337.

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tial purposes, and not for letting. But such properties are, nevertheless, constantly rated upon the basis of their annual letting value." *Nundo Lal's* case (1). In my opinion in the present case the Commissioners were not justified in departing from the basis of assessment laid down in section 101, and, while it is not the duty of this Court to instruct the Commissioners as to how assessments should be made provided they adopt the methods prescribed in the Act, it appears to me that if the persons authorized to make assessment apply their minds to the matter in hand no difficulty ought to be experienced in ascertaining according to the provisions of the Act "the gross annual rent at which" the plaintiff's holding "may be reasonably expected to let."

For these reasons, in my opinion, the decrees of the lower Courts must be set aside, and a decree passed for a declaration that the assessment on the appellant's holding was *ultra vires* and illegal as prayed. The appellant is entitled to his costs in all the Courts.

Patterson, J :—I agree.

A. T. M.

*Appeal allowed.*

(1) (1885) 1. L. R. 11 Calc. 275 (281).

Before Mr. Justice M. N. Mukerji and Mr. Justice D. N. Mitter.

KADER BUX PATWARI AND OTHERS

v.

SALIMUDDI HAZI.\*

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April, 23, 30.

*Settlement—Regulation VII of 1822—Legal effect on actual possession—Entries in Khatians prepared for the purpose of settlement—Basis of calculation of revenue—Title if affected.—Civil Procedure Code (Act V of 1908), Order 22, r. 10—Application for substitution—Entertainability before final order in a suit—Limitation—Question raised for the first time in second appeal, if can be entertained.*

The intention of a settlement made under Regulation VII of 1822 is not to touch or disturb the possession of persons in actual possession of the lands but rather to respect such possession and the entries in the *khatians* prepared for the purposes of a settlement under the Regulation do not confer a title on the persons in whose favour such entries are made but only record the fact of their possession to serve as a basis for calculation of the revenue.

An application for substitution on the death of a party to a suit can be entertained under Order 22 r. 10 Civil Procedure Code, if no final order has been made in the suit and no question of limitation arises in such a case.

A question which is raised for the first time in second appeal and which involves the investigation into certain questions of fact, cannot be entertained at such a late stage.

Appeal by the Defendants.

Suit for Recovery of *khas* possession on declaration of title.

The material facts will appear from the judgment of Mukerji, J.

*Messrs. Sarat Chandra Roy Chowdhury, D. L. Khastgir and Narendranath Bose* for the Appellants.

*Messrs. Atul Chunder Gupta and Radhikaranjan Guha* for the Respondent.

C. A. V.

The judgments of the Court were as follows :—

**Mukerji, J. :** These appeals arise out of a suit for recovery of *khas* possession of, on declaration of the plaintiffs' title to, two plots

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\*Appeals from Appellate Decrees Nos. 598 and 608 of 1927, with cross-objection, against the decrees of Babu Rasik Mohun Bhattacharya, Additional Subordinate Judge of Noakhali, dated the 30th November, 1926, modifying the decree of Babu Bhabataran Mookerjee, Additional Munsiff, dated 10th December, 1924 and that of Babu Hem Chandra Sanyal, Munsiff, 1st Court Lakhimpur, dated the 27th September, 1923.

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of land described in schedule Gha of the plaint, and also for mesne profits.

The plaintiffs' case as laid in the plaint was that the disputed land appertains to a *Kayami* ryoti holding comprising 7 kanis of land, which the plaintiffs formerly held under one Hasanali and now under one Salemuddi Haji and others; that the defendants or some of them dispossessed the plaintiffs from a part of the disputed lands in Jaistha 1312; that consequently the plaintiffs instituted a suit under section 9 of the Specific Relief Act on the 18th November 1905, obtained a decree and in execution thereof recovered possession on the 20th January 1907; that they then remained in possession till Ashar 1318 when they were again dispossessed by some of the defendants from a portion, for which they instituted a suit in 1914 which they withdrew on the 27th January 1916; and that, emboldened by this, all the defendants combined together and subsequently dispossessed them of the entire disputed land in Magh 1322.

The defence was that the plaintiffs or their predecessors had no title to the lands, that the lands in suit lie on two sides of a public navigable channel called Bairagir Dona; that on the east of the channel lies chur Mandal, a permanently settled estate, and on the west lies chur Mirzamara, a Government khas Mehal. The defendants' case was that the defendant No. 1 was occupying certain lands in this locality when on the 9th March 1891 one Rai Chandra Kumar Roy Bahadur and another who were the owners of the superior Taluk called Chur Balammara Bandabust Taluk having claimed the lands as appertaining to their Taluk and as being part of the reformation of chur Lakshmi in Kismat chur Mandal, he attorned to these owners and they granted a lease conferring abadkari jote right to him of 12 kanis of land lying on both sides of the channel; that one Ishan Chandra Tarafdar obtained a howla lease of the lands on which the defendant No. 1 executed a *kabuliat* in his favour on the 4th May 1891; that subsequently in 1904 Government made *Mas* a part of the land and called it chur Mirzamara; that since then the defendant No. 1 has been holding the lands on the east as under Ishan Tarafdar and those on the west as under the Government.

The facts necessary to be mentioned for the purposes of these appeals are the following: The land taken settlement of by the *Kabuliat* (Ex. 4) of the 26th Falgoun 1297 (9th March 1891) which the defendant No. 1 executed in favour of Rai Chandra Kumar Roy Bahadur and another was 12 kanis in area and was

described as lying on the north of the land of Hasanali and Salimuddi. In the Kabuliati (Ex. 4a) of 22nd Baisakh 1298 (= 4th May 1891) by which the defendant No. 1 attorned to Ishan Chandra Tarafdar who had taken a howla lease of the lands of the locality the same boundary was given and it was also stated that the area was 12 kapis. On the following day i. e. 23rd Baisakh 1298 (= 5th May 1891) Ishan Chandra Tarafdar granted a Patna (Ex. 5) to Salimuddi and Hasanali of 14 kanis of land which was described therein as lying to the south of the land which had been leased to the defendant No. 1 the day before. The land in suit lies on the border between the lands of Ex. 4 and Ex. 4 (a) on the one hand and Ex. 5 on the other. Then there was a partition between Hasan and Salimuddi, each of them having an 8 annas share in the lands,—by which partition Hasanali got the northern half and Salimuddi the southern half. On the 3rd Chaitra 1308 the original plaintiffs in this suit, Amjad Ali and Asraf, took a lease of 7 kanis i. e. the northern half which fell to Hasanali's share, in *Kayami* ryoti right by executing a *Kabuliati* Ex. 1. Both the Courts below have arrived at the conclusion that the plaintiffs had a good title to the disputed lands as they are parts and parcels of the land demised by Ex. 5. The Court of appeal below however has held that out of the two plots of land of Schedule Gha the one being plot No. 2 of that Schedule, which lies on the east of channel, the plaintiffs have failed to prove dispossession within 12 years and that on the other hand the defendants have been in possession of that plot for a much longer period till the institution of the suit, and in that view dismissed the suit so far as that plot was concerned. As regards plot No. 1 of Schedule Gha the Court of appeal below has decreed the suit. From this decree, some of the defendants have preferred S. A. No. 608 of 1927 and the plaintiffs a cross-objection. As regards mesne profits a separate decree was passed on appeal by the lower appellate Court from which a separate appeal has been filed by the said defendants being S. A. No. 590 of 1927, and the plaintiffs have also preferred a cross-objection. It will be convenient to take the appeals separately.

*S. A. No. 608 of 1927.*

The appeal relates to plot No. 1 of Schedule Gha, and the cross-objection to plot No. 2 of that Schedule. In connection with this appeal the appellants' contentions are two in number: 1st, that the suit was not maintainable; and 2nd, that the Courts below have misappreciated the legal effect of the settlement made under

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Regulation VII of 1822, in view of which the settlement which the plaintiffs had obtained from a trespasser could not possibly prevail.

The first of these contentions is based upon two grounds. One of these grounds is that the original plaintiffs Amjad and Asraf instituted this suit on the 25th May 1917 and then on the 4th March 1919 they transferred their rights to certain other persons in the name of one Nur Meah. On the 17th February 1923 Amjad died and no substitution having been made in the meantime the suit abated as far as Amjad was concerned on the 17th May 1923 under Order 22, r. 3. On the 16th July 1923 Amjad's widow made an application to set aside the abatement. On the 17th July 1923 Nur Miah applied to be substituted in the place of the original plaintiffs Amjad and Asraf. On the 25th September 1923 Salemuddi and Salamatulla applied to be substituted in the place of the said original plaintiffs alleging that they were the real purchasers while Nur Meah was a mere benamdar. On the 27th September 1923 the Munsiff took up all these applications and refused the widow's application holding that she was no longer the representative of Amjad and also that she had not explained the delay in making the application, and granted the applications of Nur Mea and of Salimuddi and Salamatulla. It is contended that the suit having abated the order for substitution could not be made. We are of opinion that no final order having been made in the suit at the dates when the applications were made the applications were fit to be entertained under Order 22, r. 10 Civil Procedure Code, and that no question of limitation arose. The suit, in our judgment, was a pending suit in which an application for substitution on the ground of assignment, creation or devolution of interest could be properly made and that the order for substitution was rightly made. The other ground on which the maintainability of the suit has been questioned is that the defendant No. 6 died during the pendency of the suit and his heirs were not substituted in his place and as it was a suit for possession against alleged trespassers the whole suit should fail. The point was not raised in any of the Courts below and as the contention involves the investigation into the question whether there was really any heir of the defendant No. 6 who survived him, and whether the defendant No. 6 was in possession of a specific plot separately or not and whether his heir, if any, is in such possession or not, it cannot be entertained at this stage. The ground, again, has not been taken in a memorandum of appeal.

As regards the second contention set forth above namely that

relating to the effect of the settlement made under Regulation VII of 1822, the facts seem to be as follows:—In 1905-06 the Government had the land on the west of the channel surveyed and settled under the Land Revenue Settlement Regulation VII of 1822. Plot No. 1 of Schedule Gha of the plaint in respect of which the plaintiffs have obtained the decree in the present suit is plot No. 773 of the map prepared in that survey. The map and the *Khatians* of that survey have been put in that case, and according to the appellants the *Khatian* shows that plot No. 773 of that survey was recorded as in the possession of the defendant No. 1 appertaining to his jote held under Ishan Tarafdar. The appellants' contention is that this entry in the *Khatian* created a title in the defendant No. 1, which should be taken to have ousted that of the plaintiffs who claimed to have obtained settlement from persons who were mere trespassers. We have examined the provisions of Regulation VII of 1822 and we are of opinion that the intention of a settlement made under that Regulation is not to touch or disturb the possession of persons in actual possession of the lands but rather to respect such possession and that the entries in the *Khatians* prepared for the purposes of a settlement under the Regulation do not confer a title on the person in whose favour such entries are made but only record the fact of their possession to serve as a basis for calculation of the revenue. Where, as here, it has been found on the entire evidence that the defendant No. 1 was not really in the possession of the plot No. 773 but the entry was erroneous, there is no question of the defendant No. 1 acquiring any title or of his title prevailing over that of the plaintiffs. The intention of the settlement under the Regulation as disclosed by its own terms as also by the documents Ex. C and Ex. G series was to keep in tact the incidents of Ishan Tarafdar's howla and the rights of the under-tenants and not to sweep them away. It appears further from paragraph 5 of written statement of defendant No. 1 that defendant's case was that the western portion of Dag No. 773 which is the subject matter of this appeal was being held by the defendant under Ishan Chandra Tarafdar who was the middleman under the Government. In our opinion paragraph 5 recognises the fact that the Government did not interfere with the rights of the Howladar Ishan Chandra and the real controversy in this case therefore turned in the Courts below on the question as to whether the lands were included in the *Kabuliat* which defendant executed in favour of Ishan Chandra on the 22nd of Baisakh 1298 (May 1891) (Ex. 4(a)) or whether they were included in the *Pattah* granted by Ishan Chandra in favour of the plaintiffs Salimuddi

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and Hasan Ali on the following day i. e. 23rd Baisak 1298, and both the Courts below have concurrently found that the western portion of plot 773 is covered by plaintiffs' Patta (Ex. 5) see passages 11 and 27 of the paper-book. The lower appellate Court rightly points out that the question that really arises for decision is one in the nature of a boundary dispute or in other words what is the real boundary line between the two lease holds of Exs. 4(a) and 5. This question having been answered in favour of the plaintiff respondent by both the Courts below the question in second appeal becomes really one of parcel or no parcel and upon such a question the findings of the lower Court are conclusive. It is also to be noticed that the admission made by defendant in paragraph 5 of the written statement regarding the recognition by Government of Ishan's Howla is in accordance with facts proved by evidence before the Court, for the lower appellate Court points out that the entries in Ex. G(1) and other Khatians leave no room for doubt that the settlements made by Chur Mundal zemindars with Ishan and his tenants were left in tact and recognised by Government and their existing rights were not disturbed and were not intended by Government to be disturbed by measurement of a portion within Chur Mirzamara Khas Mehal, the Courts below, in our judgment, having taken the correct view of this matter.

The two contentions urged in support of the appeal both fail and the appeal accordingly will be dismissed.

The cross-objection is not pressed and it is also dismissed.

Each party will bear his or their costs in the appeal and the cross-objection.

*S. A. 590 of 1927.*

None of the grounds urged in support of this appeal is of any substance except one which is to the effect that on calculation being made on the principle adopted by the Court of appeal below the amount of mesne profits would come up to Rs. 435 and not Rs. 450. This argument is not seriously opposed. The appeal will be dismissed subject to the modification that instead of Rs. 450, Rs. 435 will be put in the decree as the amount of mesne profits to be awarded. The other directions in the decree of the lower appellate Court will stand. The cross-objection is not pressed and is also dismissed. Each party will bear his or their costs in the appeal and the cross-objection.

Mitter, J :—I agree.

D. K. R.

*Appeal No. 608 dismissed ; Appeal No. 590, dismissed subject to modification. Cross-objections dismissed.*



*Before Mr. Justice B. B. Ghose and Mr. Justice Panton.*

RAJABALA DAS

v.

JAI CHAND LAL BABU AND OTHERS.\*

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February, 18.

*Ex parte Decree—Legality—Application by defendant for adjournment on the date fixed for hearing rejected—Time allowed for adducing evidence—Suit decreed ex parte on that very day.*

On the date fixed for the hearing of a suit the defendant made an application for adjournment on the ground that he was ill. The Court rejected the prayer but allowed him 5 days' time to adduce evidence. The Court then took plaintiff's evidence and without waiting for the said 5 days decreed the suit *ex parte* on that very day. An application was made to set aside the *ex parte* decree which was refused:

*Held*, that the trial Court was not justified in passing the *ex parte* decree on that very day and consequently the decree was wrong in form.

Appeal by the Defendant.

Application for setting aside an *ex parte* decree

The material facts will appear from the judgment.

*Mr. Punichanan Choudhury* for the Appellant.

*Mr. Gopendra Nath Das* for the Respondents.

The judgment of the Court was delivered by.

B. B. Ghose J. :—This is an appeal on behalf of the defendant against an order of the learned Subordinate Judge refusing to set aside an *ex parte* decree. On the date fixed for the hearing of the case the plaintiff was ready. The defendant prayed for time and produced a medical certificate in support of the allegation that he was ill. The Subordinate Judge was of opinion that the defendant was guilty of repeated laches on various grounds and rejected the defendant's petition but at the same time allowed five days' time to the defendant to produce his witnesses. The plaintiff's evidence was taken on that very day. Instead, however, of waiting for five days in order to enable the defendant to produce his witnesses as directed by him, the Subordinate Judge made an *ex parte* decree on that very day. This appears to be wrong in form. As to the illness of the defendant on the day when he made his application, there is no doubt, as the Subordinate Judge himself says that he

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\* Appeal from Original Order No. 346 of 1927, against the order of, Babu S. C. Baru Subordinate Judge of Burdwan, dated the 25th July, 1927.

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accepts the evidence of the Doctors who have been examined. It is true that the defendant was suffering from illness for a long time and that probably he would not have been able personally to attend the Court. The learned Judge, however, says that the defendant had a relative who looked after his case. That relative, it appears, met with an accident as he was run over by a motor car. The principal question however, is the fact that the Subordinate Judge did not wait for the five days allowed by him to the defendants. We are, however, of opinion that the original defendant who is now dead had been guilty of gross laches, as the learned Subordinate Judge has said. We, therefore, set aside the order of the learned Subordinate Judge and direct that on the appellants' paying to the respondent three gold mohurs as the costs of the hearing of this appeal irrespective of the result of the suit, the suit be restored to its original file and heard on the merits.

It should be clearly understood that the defendant, that is, the substituted defendant, must be ready to go on with the case on the date fixed, and that no further indulgence should be shown to her. We make this order without any reference to the question whether the plaintiffs are governed by the Mitakshara or Daibhag School of Hindu Law which, we are told, was the subject matter of controversy in the Court below.

If the costs are not paid by the appellant in the Court below within a month from this day, this appeal will stand dismissed and the order of the Court below refusing to set aside the *ex parte* order will stand. This order is peremptory.

Let the record be sent down without delay.

D. K. R.

*Appeal allowed.*

## PRIVY COUNCIL.

PRESENT: *Lord Blanesburgh, Lord Tomlin, Lord Thankerton,  
Sir George Lowndes and Sir Binod Mitter.*

R. M. A. R. R. M. ARUNACHALAM CHETTI

v.

V. E. A. VAYIRAVAN CHETTI AND OTHERS.

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July, 4.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE  
AT MADRAS].

*Deposit—Agent—Maraldar—Powers and responsibilities—Firm responsible to the person beneficially interested in the fund, if have authority to change its investment and give a valid discharge for its repayment—Discharge of liability.*

A was a sonless widow whose husband R had died 2 years previously. In order to provide for a future adoption by A a sum of Rs. 5000, made up partly from her *stridhan* and partly by contributions from her own father V, and her father-in-law, was handed over to V to be deposited by him with a certain Chetti firm in Rangoon. The deposit was duly made with the agreed firm, but in 1892 the fund was transferred to V's firm (which is known by the initials A. M. V. R.) to another Rangoon firm known as V. E. A., whose representatives (defendants Nos. 7 to 11) were the respondents in the appeal, defendants Nos. 1 to 6 being the representatives of V's firm. There was no evidence on the record to show under what circumstances this transfer was made. It was not done at A's instance or after consultation with her.

The V. E. A. firm received the fund which then amounted to over Rs. 10000, and credited it in their books under the heading "R. M. A. R. R. M." (which denoted the firm of A's deceased husband R) "*maral* A. M. V. R." i. e. as received through V's firm (A. M. V. R.).

In 1895 the appellant, then a minor, was adopted by A, and a sum of Rs. 6680 was withdrawn from the fund for the expenses of the adoption. Shortly afterwards a sum of Rs. 900, representing presents made to the adopted boy, was added to the deposit in the hands of the V. E. A. firm. This withdrawal and further deposit were made by A. M. V. R. Interest was duly credited on the deposits by the V. E. A. firm, and accounts were rendered annually to the A. M. V. R. firm, and this continued till 1904, when the A. M. V. R. firm, having opened a branch of their own in Rangoon, the balance of the fund was at their request paid over to them by the V. E. A. firm and the V. E. A. deposit account was finally closed.

During the whole of this period there was no communication of any sort between R's firm or A and the V. E. A. firm and no reference was made to either of them or to the appellant, who was then of full age, when the V. E. A. account was closed. Between 1904 and 1917, when the suit was filed, the appellant and his mother made numerous withdrawals, amounting in all to Rs. 8700, from the

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A. M. V. R. firm. V, the head of the firm, was the appellant's grand-father, and he survived till 1914 :

*Held*, that *maraldar* was something more than a bare agent, the limit of his powers and responsibilities depending upon the understanding between the parties. It was a question to be decided upon all the circumstances of the case whether the intention was that V and his firm, while remaining directly responsible to those to whom the beneficial interest in the fund belonged, should have authority to change its investment from time to time and to give a valid discharge for its repayment ; and having regard to the relationship of the parties, the course of dealing between them, and the other facts of the case, the only possible inference was that V and his firm were alone responsible to the appellant and his mother, and that the repayment in 1904 by the respondents' firm to V's firm, with whom alone they had dealt, was a good discharge of their liability.

Privy Council Appeal No. 144 of 1927 by the Plaintiff.

*De Gruyther K. C.* and *C. Sydney Smith* for the Appellant.

*Upjohn K. C.* and *Narisamder* for the Respondents.

The judgment of their Lordships was delivered by

July, 4.

**Sir George Lowndes :—**The appellant, in conjunction with his mother, Valliammai, sued two sets of defendants in the Court of the Subordinate Judge of Sivaganga for the recovery of the balance of certain deposits made under circumstances hereinafter detailed. The plaintiffs succeeded in the first Court in respect of the greater part of their claim against both sets of defendants. In the Court of Appeal the decree was upheld only against the first set of defendants, who are persons of no substance, and the suit was dismissed against the other and more substantial defendants. The question on appeal to His Majesty in Council is whether the second set of defendants are liable.

It is now admitted that the deposits in question were made in the year 1888, as the result of a family arrangement. Valliammai was a son-less widow whose husband Ramanathan had died two years previously. In order to provide for a future adoption by Valliammai a sum of Rs. 5,000, made up partly from her *stridhan* and partly by contributions from her own father, Veerappa, and her father-in-law, Arunachellam, was handed over to Veerappa to be deposited by him with a certain *chetti* firm in Rangoon, where high rates of interest prevailed. The deposit was duly made with the agreed firm, but in 1892 the fund was transferred by Veerappa's firm (which is known by the initials A. M. V. R.) to another Rangoon firm known as V. B. A., whose representatives were the second set of defendants in the suit (defendants 7-11) and the respondents in this appeal, defendants 1-6 being the representatives of Veerappa's firm, whose liability was affirmed by the High Court in

appeal. There is nothing on the record to show under what circumstances this transfer was made, but it is not suggested for the appellant that it was done at Valliammai's instance or after consultation with her, and it seems to have been a mere change of investment made at the assumed discretion of Veerappa.

The V. E. A. firm received the fund, which then amounted to over Rs. 10,000, and credited it in their books under the heading "R. M. A. R. R. M." (which denoted the firm of Valliammai's deceased husband, Ramanathan), "*maral* A. M. V. R.," *i. e.*, as received through Veerappa's firm (A. M. V. R.), though the exact implication of the word "*maral*" is a matter in dispute between the parties.

In 1895 the appellant, then a minor, was adopted by Valliammai, and a sum of Rs. 6,680 was withdrawn from the fund for the expenses of the adoption. Shortly afterwards a sum of Rs. 900, representing presents made to the adopted boy, was added to the deposit in the hands of the V. E. A. firm. This withdrawal and further deposit were apparently made by Veerappa's firm (A. M. V. R.), there being no evidence of any direct dealing between either Ramanathan's firm (R. M. A. R. R. M.) or Valliammai and the V. E. A. firm in Rangoon.

Interest was duly credited on the deposits by the V. E. A. firm, and accounts were rendered annually to the A. M. V. R. firm, and this continued till 1904, when the A. M. V. R. firm, having opened a branch of their own in Rangoon, the balance of the fund was at their request paid over to them by the V. E. A. firm and the V. E. A. deposit account was finally closed.

During the whole of this period there seems to have been no communication of any sort between Ramanathan's firm or Valliammai and the V. E. A. firm, and no reference was made to either of them or to the appellant, who was then of full age, when the V. E. A. account was closed. The appellant made no enquiries as to the state of the account, as to the payment of interest, or the mode of investment. Between 1904 and 1917, when the suit was filed, he and his mother made numerous withdrawals, amounting in all to Rs. 8,700, from the A. M. V. R. firm, and apparently regarded it as solely responsible to them for the deposit. Veerappa, the head of the firm, was the appellant's grandfather, and he survived till 1914. He had himself contributed the major part of the original deposit, and there is no suggestion that during his lifetime the firm was in other than good circumstances.

The significance of this prolonged course of dealings from 1904

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onwards between the appellant and Veerappa's firm seems not unnaturally to have been a matter of some anxiety to the appellant, and he tried to account for the withdrawals of the Rs. 8,700 by the allegation that he had other and independent funds with the A. M. V. R. firm, but this has been held by both Courts in India to be untrue, and it is not now disputed that they were withdrawals from the deposit account in suit.

It may also be noted that in a power of attorney from Valliammai to the appellant, given in 1917 with a view to the suit, it is stated that her *stridhan* moneys, which formed part of the original deposit, were "due to her only from the family of her father."

On this state of facts their Lordships have to decide whether the V. E. A. firm, represented by the respondents in this appeal, are liable to the appellant for the fund which was deposited with them by Veerappa's firm, and the proper balance of which was repaid by them to that firm as long ago as 1904.

The appellant's case has been rested before this Board mainly on the heading of the account as kept by the V. E. A. firm. The money, it is contended, was credited by them to Ramanathan's firm (R. M. A. R. R. M.), Veerappa's firm only appearing in their accounts as the *maraldar*—i.e., the agent through whom the deposit was made; the receipt of Veerappa's firm, therefore, could not be a valid discharge as against the appellant; moreover, the Appeal Court held that the V. E. A. firm must have known who the R. M. A. R. R. M. firm were. It might perhaps be objected that neither the appellant nor Valliammai was shown to represent the R. M. A. R. R. M. firm, nor did they sue as representing it. It may well have been that the V. E. A. firm in Rangoon knew who the R. M. A. R. R. M. firm were without knowing anything about Valliammai or her adopted son, but their Lordships do not think it necessary to pursue this suggestion.

Much time was devoted in the Subordinate Judge's Court to the discussion of a *maraldar's* position and responsibilities under the trade usage prevailing among the *chettis* of Southern India, but nothing definite results from the discussion. It has not been suggested that a custom was established, and it has not been seriously contended for the appellant before this Board that any conclusion can be based upon the mere use of the word "*maral*." The *maraldar* is clearly something more than a bare agent, the limit of his powers and responsibilities depending upon the understanding between the parties. It is, in their Lordships' opinion, a question to be decided upon all the circumstances of the case whether the

intention was that Veerappa and his firm, while remaining directly responsible to those to whom the beneficial interest in the fund belonged, should have authority to change its investment from time to time and to give a valid discharge for its repayment ; and having regard to the relationship of the parties, the course of dealing between them, and the other facts set out above, their Lordships have no doubt that the only possible inference is that Veerappa and his firm were alone to be responsible to the appellant and his mother, and that the repayment in 1904 by the respondents' firm to Veerappa's firm, with whom alone they had dealt, was a good discharge of their liability.

Their Lordships are therefore satisfied that the decree of the High Court in India should be affirmed, and they will humbly advise His Majesty accordingly. The appellant must pay the costs of this appeal.

*R. S. L. Polak* : Solicitors for the Appellant.

*Douglas, Grant & Dold* : Solicitors for the Respondents.

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*Appeal dismissed.*

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PRESENT : *Lord Blanesburgh, Lord Tomlin, Lord Thankerton,*  
*Sir George Lowndes and Sir Binod Mitter.*

RAJA PATESHWARI PARTAB NARAIN SINGH, SINCE  
DECEASED (NOW REPRESENTED BY RAJA  
JWALESHWARI PARTAB NARAIN SINGH)

v.

SITA RAM AND OTHERS.

[ON APPEAL FROM THE CHIEF COURT OF OUDH AT LUCKNOW.]

*Pre-emption—Property divided in blocks—Purchase of one block—Refusal to purchase other blocks—Water—Village community—Notice—Oudh Laws Act, (XVIII of 1876) Sec. 11—Acquiescence.*

The owner, being desirous of disposing of certain property, divided it into a number of blocks and offered them for sale. The blocks were clearly delineated upon separate plans, and separate *khassras* and *jamabandis* were prepared for each. Block No. 19 was purchased by

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the appellant, the Raja of Basti; blocks Nos. 7 and 9 by Dargahl (now deceased and represented by Sita Ram and Madho, respondents in Appeals Nos. 29 and 30) and Mata Prasad (respondent in Appeals Nos. 29 and 30); and blocks Nos. 10-13, 15 and 20 by Raja Mohammad Mumtas Ali, the respondent in Appeal No. 31. The appellant had procured a list of all the blocks, containing the prices, but he definitely refused to purchase any but block No. 19 which was adjacent to his own estate. The conveyance of block No. 19 to the appellant was executed and registered on the 9th June, 1924; the conveyance of block No. 7 to respondents in Nos. 29 and 30 was executed on the same day, but at a later hour. The oral agreement for sale with the respondent in Appeal No. 31 was entered into some time prior to the agreement with the appellant but when the latter refused to purchase any of the other blocks he was aware of that agreement and acquiesced in it. The sale to respondent in Appeal No. 31 was completed on the 18th June, 1924 and the second sale to the respondents in Appeals Nos. 29 and 30 on the 21st July following. The appellant claimed to pre-empt the other blocks:

*Held*, assuming that the prior completed purchase by the appellant, under other circumstances, had given him the right of pre-emption in respect of other blocks, he had by his conduct, waived this right and could not re-assert it: *Bhagwat Singh v. Syed Nasir Husain* (1); *Bank of Upper India v. Munshi Alept Prasad* (2) and *Hannuman Singh v. Aditya Prasad* (3) approved.

It was contended for the appellant that, upon the death of the original owner of the property, the ten persons who were the devisees became a village community within the meaning of section 7 of the Oudh Act, and that as soon as the appellant purchased block No. 19 he became a member of that community.

*Held*, that the owner's devisees merely by reason of an interest in the land so acquired, did not constitute a village community which was not shown to exist apart from themselves.

Their Lordships were not prepared in the present case to affirm the correctness of the proposition that only persons having an interest in the village lands should be deemed to be members of the community.

Their Lordships did not think it necessary to decide in this appeal as to the possible competition between the rights acquired by a contract for sale and those attaching under the Oudh Act to a completed conveyance. Their Lordships said "It may be that in such a case there is a direct conflict between the statutory rights attached under Chapter III of the Transfer of Property Act to an agreement for sale, and the right of pre-emption conferred by the Oudh Laws Act."

No formal notice of the proposal to sell any of the plots in suit was given by the seller:

*Held*, that the appellant's refusal to purchase any of the other plots and his acquiescence in the sale to the respondent in Appeal No. 31 might have induced the seller to believe that the statutory notice was unnecessary, and if it had

(1) 5 Oudh Cases. 395.

(2) 10 Oudh Cases 257.

(3) (1919) 22 Oudh Cases 323.



been given it would seem that the present suit would have been barred by section 11 of the Oudh Laws Act.

Privy Council Appeals No. 29, 30 and 31 by the Plaintiff in three suits.

The material facts appear from their Lordships' judgment.

*Dunn K. C, Jopling* for the Appellant.

*De Gruyter K. C. and Dube and Parikh* for the Respondents.

Their Lordships judgment was delivered by.

**Sir George Lowndes :** These three consolidated appeals raise a somewhat unusual question under the law of pre-emption in Oudh. The facts are as follows:—

In December, 1872, the Secretary of State made a grant of a large tract of waste land in the Gonda District to one William Cooke. The land was described in the deed of grant as situated in the village of Agya, but under subsequent Settlement proceedings it seems to have been constituted a separate "village" known as Cookenagar Grant. The word "village" in this connection, however, denotes little (if anything) more than a revenue unit. In 1924, when the transactions which led to this litigation took place, the original grantee was dead, and the estate was vested under the provisions of his will in ten persons living in England, and was managed on their behalf in India by a Mr. Stern. The owners being desirous of disposing of the property, it was divided up into a number of blocks, which were offered for sale locally by Mr. Stern. Block No. 19 was purchased by the appellant, the Raja of Basti; blocks No. 7 and 9 by Dargahi (now deceased and represented by Sita Ram and Madho) and Mata Prasad, the respondents in two of the appeals; and blocks Nos. 10—13, 15 and 20 by Raja Mohammad Mumtaz Ali, the respondent in the third appeal. It is not now disputed that the conveyance of block No. 19 to the appellant was executed and registered on the 9th June, 1924 before any of the other sales were formally completed, though the conveyance of block No. 7 to Dargahi and Mata Prasad was executed on the same day, but at a later hour. The sale to Raja Mohammad Mumtaz Ali was not completed till the 18th June, 1924, and the second sale to Dargahi and Mata Prasad (block No. 9) not till the 21st July following.

Under these circumstances the appellant claimed to pre-empt the other blocks, and filed three suits in the Court of the Subordinate Judge of Gonda against their several purchasers to enforce his claims. The two suits against Dargahi and Mata Prasad were tried together and one judgment was deliver-

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ed in both, the Subordinate Judge holding that the appellant's claim in respect of block No. 7 was not established, but that his claim in respect of block No. 9 was. The one suit was therefore dismissed, and in the other a decree for pre-emption was made upon the usual terms. The third suit against Raja Mohammad Mumtaz Ali was tried by the same Judge, but separately, and was also dismissed. Appeals were filed by the unsuccessful parties in each of the three cases to the Chief Court of Oudh. The appeals were apparently heard together, and were decided by one judgment, the result of which was that the appellant, the Raja of Basti, was defeated in all three cases, his two appeals being dismissed, and the appeal of the respondent purchasers of block No. 9 being allowed.

The appellant before this Board has maintained his right to pre-emption in all the three cases under the provisions of Chapter II of the Oudh Laws Act, XVIII of 1876.

On the argument of these appeals a number of questions have been raised of considerable complexity and depending upon the intimate construction of this somewhat abstruse enactment. Their Lordships, however, are satisfied that the appellant must fail in each of them on the threshold of the Act, having regard to certain findings of fact in which both the Courts in India have concurred.

The sales in question were all carried out on behalf of the vendors by Mr. Stern. The blocks were in the market for some time. They were clearly delineated upon separate plans, and separate *khassras* and *jamabandis* were prepared for each. The Subordinate Judge held that the appellant had procured a list of all the blocks, containing the prices; that he knew that they were all in the market and could be had for these prices, but that he definitely refused to purchase any but block No. 19, which was adjacent to his own estate. The appellate Court came in effect to the same conclusion. They held that the appellant told Mr. Stern that he wished to purchase block No. 19 only and that he did not wish to purchase any other block. The oral agreement for sale with Raja Mohammad Mumtaz Ali was entered into some time prior to the agreement with the appellant, but both Courts held that when he refused to purchase any of the other blocks he was aware of the agreement with Raja Mohammad Mumtaz Ali and acquiesced in it.

Upon this state of facts their Lordships are clearly of opinion that, assuming that the prior completed purchase by the appel-

lant would, under other circumstances, have given him the right of pre-emption in respect of the blocks in suit, he must be taken by his conduct to have waived this right, and that it would be inequitable to allow him now to re-assert it. This principle has been recognized in previous cases by the Oudh Courts: see *Ishagwat Singh v. Syed Nasir Husain* (1); *Bank of Upper India and others v. Munshi Alopi Prasad* (2); and *Hamman Singh and another v. Adiya Prasad and another* (3); and it has been applied to some extent at all events by the judgment of the Subordinate Judge in the present case.

Having come to this conclusion, their Lordships will only touch briefly upon certain other questions which have formed the subject of argument before them.

The decision of the Chief Court ultimately turned upon the question whether the appellant was by reason of his purchase a member of the village community of Cookenagar Grant, inasmuch as under section 7 of the Oudh Act the right of pre-emption is only to be presumed to exist in "village communities." This expression is not defined in the Act, and no evidence was given in any of the suits as to the existence of a "village community" in Cookenagar Grant. It was, however, contended for the appellant that, upon the death of Cooke, who was till then the sole owner of the village, the ten persons living in England who were his devisees became a village community within the meaning of the Act, and that as soon as the appellant purchased block No. 19 he became a member of that community. It may be that, as appears to have been held in other cases by the Oudh Courts, only persons having an interest in the village lands should be deemed to be members of the community, though their Lordships are not prepared in the present case to affirm the correctness of this proposition; but it by no means follows from this that Cooke's devisees merely by reason of an interest in the land so acquired should be assumed to constitute a village community which was not shown to exist apart from themselves.

Another question which was the subject of considerable discussion before this Board turned upon the possible competition between the rights acquired by a contract for sale and those attaching under the Oudh Act to a completed conveyance. It was found by the Courts in India that the agreement for sale of Raja Mohammad Mumtaz Ali's plots was prior in date to the agreement

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for sale of block No. 19 to the appellant, but that the registered sale deed of the appellant preceded by some ten days the completion of Raja Mohammad Mumtaz Ali's purchase. Both Courts were of opinion that under these circumstances the appellant had no right of pre-emption as against Raja Mohammad Mumtaz Ali. It may be that in such a case there is a direct conflict between the statutory rights attached under Chapter III of the Transfer of Property Act to an agreement for sale, and the right of pre-emption conferred by the Oudh Laws Act, and that this question may need further consideration at some future time. Their Lordships do not think it necessary to come to any conclusion upon it in these appeals.

The matter of notice under section 10 of the Act was also discussed. It was admitted that no formal notice of his proposal to sell any of the plots in suit was given by Mr. Stern, but in their Lordships' view this cannot help the appellant. His refusal to purchase any of the other plots, and his acquiescence in the sale to Raja Mohammad Mumtaz Ali may well have induced Mr. Stern to believe that the statutory notice was unnecessary, and if it had been given it seems clear that the present suits would have been barred by section 11.

For the reasons already stated, their Lordships are of opinion that the present appeals must fail, and they will humbly advise His Majesty that they should be dismissed. The appellant must pay the costs of both sets of the respondents.

*Barrow, Rogers and Nevill* : Solicitors for the Appellant.

*R. S. L. Polak and T. L. Wilson & Co* : Solicitors for the Respondents.

A. T. M.

*Appeals dismissed.*

PRESENT: *Viscount Sumner, Lord Warrington of Clyffe  
and Lord Atkin.*

MESSRS. KAMLAPAT—MOTI LAL

v.

THE UNION INDIAN SUGAR MILLS COMPANY,  
LIMITED (IN LIQUIDATION).

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE  
AT ALLAHABAD]

*Winding-up—Arrangement to pay off creditor—Mortgage—Arrangement sanctioned by Court—Amended scheme not submitted for approval by shareholders, but sanctioned by Court, if valid—Usufructuary mortgage—Transfer of Property Act (IV of 1882), Sec. 76.*

An amended scheme in a winding-up proceeding, to advance substantial sums on mortgage on the terms that the mortgagee would manage the business for a term of years and recoup themselves out of the profits, though sanctioned by the Court, is not valid, if not approved by the share-holders at their meeting.

The proposed mortgage in the present case is an usufructuary mortgage; and no further duty of care can be imposed upon the mortgagee than arises out of the statutory duties imposed upon mortgagees in possession under section 76 of the Transfer of Property Act on the one hand, or of the ordinary legal duties of managing agents on the other.

Privy Council Appeal No. 133 of 1928 by the Mortgagees.

The material facts appear from the judgment of their Lordships.

*Upjohn K. C., Dunne K. C., and Cecil W. Turner* for the Appellants.

*Simonds K. C. and J. R. Stamp* for the Respondents.

The judgment of their Lordships was delivered by

**Lord Atkin** :—This is an appeal from the High Court of Judicature at Allahabad in a proceeding in the course of the winding up by the Court of the Union Indian Sugar Mills Company. On the 28th May, 1926, the winding-up order was made on a creditor's petition. The company carried on an extensive business and strenuous efforts were made by the shareholders to save the concern. Eventually alternative proposals were made by various financial houses either to buy the undertaking out and out: or to advance on mortgage defined sums on the terms that the mortgagees managed the business for a term of years and recouped themselves out of the profits. In due course these proposals were laid before the Court by the liquidators for direction. The Court directed a

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meeting of shareholders to be held to decide whether they would accept the offers of Lala Har Kishin Lal or of Lala Kamlapat the appellants. Both parties had put forward a scheme to advance substantial sums on mortgage; and both had alternatively offered to purchase at a named sum. It is clear that all parties concerned and the Court considered that they were acting under the provisions of section 153 of the Indian Companies Act, 1913, which provides that where an arrangement is proposed between the company and its members or any of them, the Court may order a meeting of the members of the Company; and if a majority of three-fourths in value present in person or in proxy at the meeting agree to any arrangement, the arrangement if sanctioned by the Court shall be binding on the members and the Company. The question was raised by Counsel for the liquidators whether in fact the proposals did amount to an arrangement between the Company and its members; but for reasons to be given later this appears to their Lordships in the circumstances of this case immaterial. The proposal of the appellants Kamlapat as laid before this meeting was as follows:—

That the applicant is willing to advance a sum of rupees ten lacs to the above Company in liquidation on the terms annexed herewith and is also prepared to purchase it for rupees eleven lacs fifty thousand on the conditions mentioned therein.

1. Deposit of Rs 1,50,000 to-day and Rs. 8,50,000 within a month of this date, which should be paid to creditors as early as possible, the balance, if any, after paying the legal debts, to be returned to us.

2. The Company to be mortgaged to us at 8 per cent. compound interest with six monthly rests.

3. We to be the managing agents for ten years even if mortgage paid off earlier, and to get all the advantages which the present managing director enjoy and to get 5 per cent. commission on net profits only.

4. The mortgage with interest to be paid off first and then the share-holders to get the profit.

5. We to provide entire working capital against the goods of the Company at 8 per cent. per annum.

6. The Company to be handed over to us as soon as we deposit the entire money.

7. The consent of the share-holders to be obtained to the above scheme,

8. In case the share-holders do not accept the scheme, we are willing to purchase the company at Rs. 11,50,000.

(Signed) KAMLAPAT.

(Signed) RAMAKANT MALAVIYA, vakil for  
L. Kamlapat.

22nd November, 1926.

The meeting of share-holders was duly held on the 16th December, 1926, and Kamlapat's scheme was accepted by a large majority. On the 21st December the liquidators reported that they had received claims from creditors amounting to Rs. 10,61,168. On the same day the Court sat to consider the approval of Kamlapat's scheme. They found, however, as they state in their judgment, that a new situation had been created by the liquidators' report, inasmuch as the previous proceedings had taken place under the impression of the Court as well as the previous persons interested, that the sum of Rs. 10,00,000 would fully satisfy all the creditors. Hopes were, however, held out that Kamlapat might increase their offer to advance 10,00,000 to 12,00,000. Rather than decide to reject the scheme or accept an offer for an out-and-out sale, the Court decided to adjourn the matter to enable Kamlapat to increase their offer; and consented that Kamlapat should be given immediate possession on the understanding that the out-and-out sale or the mortgage should be effected in his favour in the near future. On the same day Kamlapat completed the payment of Rs. 10,00,000 to the liquidators. On the 24th December they were given possession of the properties by the liquidators. On the 7th January Kamlapat stated that they were willing to advance a further sum of Rs. 37,000 which, with the 10,00,000, they believed would be sufficient to discharge all the liabilities and to advance a further sum of 25,000 to cover the liquidators' charges "on the terms proposed for 10 lacs." On this footing the scheme went forward. On the 25th February the Court appear to have approved the scheme in principle. They directed that a mortgage deed be executed for Rs. 10,62,000. The terms were to be submitted to the Government conveyancer. After the terms had been settled by the parties and examined by Mr. Weir they were to be submitted to the Court for their consideration and sanction.

Disputes, however, arose between Kamlapat and the liquidators as to the terms of the mortgage deed. Eventually, by order dated the 20th June, 1927, the Court approved the deed as settled by Government conveyancer and directed the liquidators to take steps for getting it executed. Unfortunately, it seems to have escaped

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the notice of the Court that the scheme approved by them and purporting to be recorded in the draft deed was not the scheme accepted by the meeting of share-holders. The accepted scheme provided for an advance only of 10 lacs; the new scheme evolved by the new situation provided for a further advance of Rs. 62,000. It is possible that the share-holders would have gladly accepted the further advance; it is, however, possible that they might consider the extra burden turned the scale; and indeed a warning note had been sounded by three share-holders, who by a petition of the 28th March pointed out that the share-holders had accepted an advance of 10 lacs only; that it was uncertain whether even Rs. 62,000 more would meet the further liabilities; that prices were going down and they petitioned for an out-and-out sale. The scheme had been put before the meeting in written form submitted to the Court by Kamlapat; the approval of the meeting was not taken as is usual in carefully drawn schemes subject to modifications to be approved by the Court. Their Lordships find it impossible to hold that the amended scheme had been approved by the share-holders at the meeting on the 16th December or that the share-holders impliedly assented to an increased advance of Rs. 62,000.

Faced with this difficulty Counsel for the liquidators argued before the Board that the scheme was not within section 153 at all; and that it was a mere scheme for financing the company's affairs which the Court could in the liquidation approve without the necessity of having it approved by the share-holders. Their Lordships find it unnecessary to determine whether this was a scheme under section 153. It is plain that the Court thought that it was; and as it appears in any case that the action of the Court has throughout been taken on the basis that the particular scheme they were approving had in fact been accepted by the share-holders' meeting the case must be dealt with on that footing. The result is that as the share-holders have not assented to the scheme as approved the orders of the Court dated the 25th February, 28th March, 7th April, 9th April, 20th April, 29th April, 4th May, 23rd May, 25th May, and 20th June, 1927, must be set aside. A meeting of share-holders should be summoned to consider the amended scheme; and it seems advisable that the scheme as laid before the share-holders should be more detailed than before; and should reserve the power to the Court to approve modifications. Meanwhile proceedings in the liquidation should be confined to the steps necessary for laying the scheme before the meeting and reporting thereon to the Court.



As the terms of the draft deed are in the circumstances reopened, it seems unnecessary for the Board to settle its terms where these have been in dispute. But as the matters have been argued before them their Lordships think it right to intimate that they have no doubt that the proposed mortgage is an usufructuary mortgage; and that no further duty of care can be imposed upon the mortgagees than arises out of the statutory duties imposed upon mortgagees in possession under section 76 of the Transfer of Property Act on the one hand, or of the ordinary legal duties of managing agents on the other. They cannot see that any advantage is gained by seeking expressly to define these. On the question of net profits they express no opinion as the parties seem to have been agreed as to how these should be calculated.

Their Lordships consider that the abortive result of the proceedings in the High Court is due in part measure to the failure of the appellants to take the objection on which they have succeeded. It was suggested at one time tentatively and not pressed. In the circumstances they come to the conclusion that there should be no costs of the appeal. The appeal should be allowed and the orders already mentioned should be set aside. Their Lordships will humbly advise His Majesty accordingly.

*Watkins & Hunter* : Solicitors for the Appellants.

*Douglas, Grant & Dold* : Solicitors for the Respondents.

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*Appeal allowed.*

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## FULL BENCH.

*Before Sir George Claus Rankin, Knight, Chief Justice, Mr. Justice C. C. Ghose, Mr. Justice Buckland, Mr. Justice B. B. Ghose and Mr. Justice M. N. Mukerji.*

TAI EBALI AND OTHERS

v.

ABDUL AZIZ AND OTHERS.\*

CIVIL.

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September, 2.

*Appeal, if competent—Appeal against preliminary decree—Final decree passed before the filing of appeal—Preliminary and final decrees, nature of—Execution Court, if can enquire whether the final decree ceased to have any effect.*

When a preliminary decree is set aside, the final decree is superseded whether the appeal was brought before or after the passing of the final decree and an appellate Court when setting aside or varying a preliminary decree can, and indeed should, give directions for the setting aside or varying of the final decree if the existence of the final decree is brought to its notice.

It is not necessary for a party aggrieved by a preliminary decree to appeal both from that decree and the final decree in order to maintain his appeal against the preliminary decree.

*Khrodasoyi v. Adkar* (1) over-ruled.

A preliminary decree is not a mere interlocutory order whose force is spent when the suit is disposed of, : *Madhu Sudan v. Kamini Kanta* (2) disowned from.

A final decree is, in its nature, dependent and subordinate. The function of the final decree is merely to re-state and apply with precision what the preliminary decree has ordered.

The mere fact of a final decree is not evidence of conduct or even of laches, which prevented a party from exercising any right of appeal therefrom conferred upon by law.

A Court of execution is entitled to enquire whether the final decree originally passed is still subsisting or has ceased to have effect : *Ram Nath v. Basanta* (3) approved.

Appeal by the Decree-holder.

Application for execution.

Plaintiffs obtained a preliminary decree in a suit for redemption. The defendants appealed against this preliminary decree. Before

\* Full Bench Reference No. 1 of 1929 in Appeal from Appellate Order No. 423 of 1928, against the order of N. L. Hindley Esq., District Judge of Tippera, dated the 14th May, 1928, affirming that of Babu P. C. Ghose, Munsiff 1st Court, at Nabnagar, dated the 15th February, 1928.

(1) (1912) 18 C. L. J. 321.

(2) (1905) L. L. R. 32 Cal. 1023 (1029).

(3) (1913) 18 C. L. J. 209; 17 C. W. N. 8.

the appeal was filed, a final decree was passed. The appeal was allowed and the suit was dismissed. Some two years after the plaintiffs applied for execution of the final decree. The Courts below rejected the application. On second appeal, the case was referred to the Full Bench by the following

*Order of Reference.*

B. B. Ghose, J:—This is an appeal by the decree-holder against an order of the District Judge affirming on appeal an order of the Munsiff by which an objection raised by the judgment-debtor under section 47 of the Code of Civil Procedure that the decree was incapable of execution was sustained.

The facts are that the decree-holder was plaintiff in a suit for redemption of a mortgage under which it was alleged that the judgment-debtor defendant was in possession of the lands in suit. The defendant denied that there was any mortgage and asserted that he was the owner of the land in suit and not a mortgagee. The trial Court passed a preliminary decree in favour of the plaintiff for redemption on payment of a sum of money, holding that there was a mortgage. The decree was made on the 8th of December, 1924. The final decree was made on the 19th of December, 1924. The defendant preferred an appeal against the preliminary decree on the 6th of January, 1925, and that decree was reversed, and the plaintiff's suit dismissed entirely by the Appellate Court on 14th December, 1925. The plaintiff now seeks to execute the final decree made by the trial Court on the 19th of December, 1924, although his suit was dismissed on appeal against the preliminary decree by the defendant.

Both the Courts below have held that the final decree is incapable of execution as the preliminary decree on which it was based was set aside on appeal. The decree-holder appeals against that decision and it is contended that having regard to a series of cases in this Court, in which it was held that an appeal against a preliminary decree after the passing of a final decree is incompetent, it should be held that the decree of the Appellate Court of the 14th of December, 1925, was void, and the final decree for redemption made by the trial Court is still effective and the decree-holder is entitled to execute it.

The learned Munsiff has fully discussed the questions involved in the case, but he was under the necessity of distinguishing the present case from the reported cases relied on by the decree-holder. But it seems to me that the distinction is not substan-

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tial, for a decree in an appeal which is incompetent is of no effect. The learned District Judge has considered the general question arising in the case and has held that the final decree should be considered as not in existence after the reversal of the preliminary decree. He has observed that the matter in issue in this case came up before him more than once. He has referred to the practice of this Court to "condone any technical defect" in an appeal against the preliminary decree by allowing the memorandum of appeal to be amended by adding some words to it. This practice has been resorted to as a device for avoiding the effect of the decisions referred to and I think the practice is hardly defensible in every case.

In my opinion the cases in which it has been held that an appeal against a preliminary decree is incompetent where a final decree has been passed before the appeal was presented against the preliminary decree, have not been correctly decided. Under the Civil Procedure Code (section 96) an appeal lies against every decree unless otherwise expressly provided in the Code or any other law. Under section 97 of the present Code if any party aggrieved by a preliminary decree does not appeal from such decree he is precluded from disputing its correctness by an appeal from the final decree. There is no provision under which the right of appeal from the preliminary decree is taken away if a final decree is passed before the time for appealing against the preliminary decree has expired.

The cases which decided that such an appeal is not maintainable purported to follow the principle laid down in *Madhu Sudan v. Kamini Kanta* (1). That was a case decided under the Code of 1882. The appeal was against an interlocutory order of remand apparently made under section 562 and sub-section (28) of section 388 allowed an appeal against such an order. The question was whether or not the unsuccessful party had lost his right of appeal in that he allowed the final decree to be passed uncontested before exercising it. Maclean, C. J., said with reference to such orders:—"Many of them do not affect the final decision as regards the rights of the parties—their force lasts only as long as the suit is pending. It seems to us to be clear that the right of appeal from such orders ceases with the disposal of the suit.....A party failing to appeal from an order of remand is not without a remedy. He may appeal from the final decision and on that appeal take exception to the validity of the order of remand." Another case often referred

(1) (1905) I. L. R. 32 Calc. 1023.

to and followed is that of *Mackensie v. Narsingh* (1). In that case a preliminary decree for partition was made in April, 1907, and the final decree was made on 10th July, 1907. An appeal against the preliminary decree was taken on the 19th of July, 1907. Under those circumstances the principle laid down in *Madhu Suddhan's* case (2) as to interlocutory orders was followed. It will be observed that under the Code of 1882 by appealing against the final decree the appellant was competent to question the correctness of the preliminary decree and it might very well be said that after the final decree the preliminary decree had no separate existence which might be appealed against. These cases have subsequently been followed as authorities against the maintainability of an appeal against a preliminary decree under the present Code after the final decree has been made. It seems to me that after the enactment of section 97 of the Civil Procedure Code the ground upon which those decisions were based that a party could challenge the correctness of a preliminary decree on an appeal from the final decree has ceased to exist. Under the present Code the preliminary decree has a separate existence from the final decree. In several of the cases referred to it seems to have been assumed that the final decree would remain in force even if the preliminary decree on which it was based is set aside and so it was held that the final decree must also be appealed against. In my judgment this view is erroneous, as a final decree based on a preliminary decree, when that decree is afterwards set aside, falls to the ground, being only a dependent decree such as is referred to in *Shama Purshad v. Hurro Purshad* (3), see also the observations in *Ram Naik v. Basanta* (4); *Abdul Jalil v. Amar Chand* (5), *Nistarini v. Rai Mohun* (6); *Atul v. Kunja* (7). It seems to me also unreasonable to require a person to appeal against a final decree, which may be perfectly correct according to the preliminary decree, in order to enable him to maintain his appeal against the preliminary decree. There may be no ground of appeal which can be urged against the final decree, yet he is compelled to find some illusory ground. To illustrate my point,—take for instance a preliminary decree on a mortgage which may be erroneous. But the final decree which is simply based on it is absolutely correct. The present case is an illustration of this. It

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(1) (1909) 1 L. R. 36 Calc. 762; 10 C. L. J. 113.

(2) (1905) 1 L. R. 31 Calc. 1923.

(3) (1865) 10 M. L. A. 203, (211-12).

(4) (1913) 13 C. L. J. 209; 17 C. W. N. 868.

(5) (1913) 18 C. L. J. 223.

(6) (1913) 18 C. L. J. 214.

(7) (1917) 27 C. L. J. 451.

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appears to be a meaningless and vexatious procedure to require a party to appeal against a final decree which is itself unassailable in order to enable him to maintain an appeal against a different decree. In my judgment a person is entitled to maintain an appeal against a preliminary decree although he has not appealed against the final decree passed in accordance with it before he prefers his appeal.

The question involved in this case arises frequently and as there is considerable divergence of judicial opinion I consider it necessary that the matter should be settled by a Full Bench.

The cases supporting the contention of the appellant that the appeal against the preliminary decree was not maintainable are—

*Khirdamoyi v. Adhar* (1); *Kulada v. Ramananda* (2); *Tara-prasanna v. Kalikamohan* (3); *Atul Chandra v. Kunja Behari* (4); *Sadhu Charan v. Hara Nath* (5); *Nanibala v. Ichhamoyee* (6).

Those supporting contrary view are—

*Musamat Bibi Wahidunnisa v. Babu Deep Narain Prosad* (7); *Bhagaban v. Ishan* (8); *Kankaiya Lal v. Tyrbini* (9); *Lakshmi v. Maru Devi* (10); *Ramuvien v. Veerappudayan* (11).

I would refer the following questions for consideration by the Full Bench :—

(1) Whether an appeal from a preliminary decree is incompetent if a final decree is made before the appeal is presented?

(2) Whether it is necessary for a party aggrieved by a preliminary decree to appeal both from that decree and the final decree in order to maintain his appeal against the preliminary decree, although the final decree apart from its being based on the preliminary decree may be otherwise correct?

This being an appeal from an Appellate order under section 47 of Code of Civil Procedure the appeal is referred for final decision to the Full Bench.

N. K. Bose, J :—I agree.

*Mr. Sailendra Mohan Dey* for the Appellants.

*Messrs. A. C. Gupta and Bhagirath Chandra Das* for the Respondents.

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(1) (1912) 18 C. L. J. 321.

(2) (1921) I. L. R. 48 Calc. 1036; 33 C. L. J. 414.

(3) (1923) 38 C. L. J. 111.

(4) (1915) 22 C. L. J. 90.

(5) (1914) 20 C. W. N. 231.

(6) (1923) 40 C. L. J. 291.

(7) (1916) 20 C. W. N. 1174. (Patna) (8) (1918) 22 C. W. N. 831.

(9) (1914) I. L. R. 36 All. 532.

(10) (1911) I. L. R. 37 Mad. 29.

(11) (1912) I. L. R. 37 Mad. 455.

The following judgments were delivered :

**Rankin, C. J.** :—The plaintiff brought a suit in the Court of the Munsiff on the allegation that the defendant was in possession of certain land under a mortgage by conditional sale made to him by the plaintiff and claimed to redeem the mortgage and to recover possession of the land. The defendant contended that the mortgage was not genuine and that the land was his own. A preliminary decree for redemption was made on the 8th of December 1924 and on the 19th December a final decree for redemption was made, the defendant not appearing. The defendant, on the 6th of January, preferred an appeal to the lower appellate Court against the preliminary decree. When this appeal came on for hearing no objection was raised that the appeal was incompetent, and on the 14th of December 1925, the appeal was allowed and the plaintiff's suit was dismissed altogether. Two years afterwards the plaintiff applied to the Court of the Munsif for execution of the final decree. The defendant objected to the execution on the ground that the preliminary decree upon the basis of which the final decree had been passed, having been set aside, the final decree was not a subsisting decree of which execution could be had. The Munsif, and, on appeal from him, the District Judge, have upheld this objection. On second appeal to the High Court by the plaintiff a Division Bench has expressed the opinion that the judgments of the lower Courts are correct, but, in view of certain previous decisions of this Court, has referred the case to a Full Bench for final decision and has formulated the following questions :—

(1) Whether an appeal from a preliminary decree is incompetent if a final decree is made before the appeal is presented ?

(2) Whether it is necessary for a party aggrieved by a preliminary decree to appeal both from that decree and the final decree in order to maintain his appeal against the preliminary decree, although the final decree apart from its being based on the preliminary decree may be otherwise correct ?

In the present case no question arises of the defendant having, by his conduct subsequent to the passing of the preliminary decree, precluded himself from exercising any right of appeal therefrom conferred upon him by the general law. It is not necessary therefore to discuss such cases as *Baikantha's case* (1) or *Shah Sulin v. Hajira* (2) or to enquire what kind of conduct will debar a litigant from exercising a right of appeal given to him by Statute. The mere fact of a final decree is not evidence of such conduct or even

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(1) (1907) 12 C. W. N. 590.

(2) (1927) I. L. R. 35 Calc. 306.

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of laches. Again, whether or not the defendant, after the passing of the preliminary decree, ought to have preferred an appeal from the final decree as well, it is by no means manifest that the lower appellate Court was without jurisdiction to hear the appeal from the preliminary decree. As it did, in fact, dismiss the plaintiff's suit, it may well be contended that this decision must govern the parties' rights even if it be supposed that the appeal ought not to have been decreed. Indeed the decision in *Abdul Jalil v. Amir Chand* (1) is an authority to this effect.

I propose, however, to examine the two questions referred to us. In practice they have been found to give rise to much difficulty both in this Court and in the lower Courts.

The terms "preliminary" and "final" decree were probably in general use before 1908 but section 2 of the Civil Procedure Code of that year introduced them as technical expressions and provided a definition—"A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final." Under the present Code suits to redeem or to enforce a mortgage, suits for partition, partnership suits, suits for accounts and other classes of suits are now disposed of by means of two decrees—the preliminary decree which usually settles the rights of the parties, and in this sense is final [*C. F. Rahimbhoy v. Turner* (2)] in this sense is final but which looks forward to a further decree to be made after the rights of the parties, thus declared, have been worked out by subordinate enquiries and/or other means. Under the Code of 1882, different provisions were made for different classes of suits. Thus, as regards suits for possession of immoveable property and for mesne profits, section 212 provided that "the court may however determine the amount by the decree itself or may pass a decree for the property and direct an enquiry into the amount of mesne profits and dispose of the same on further orders." As regards administration suits the provision of section 213 was that "the court before making the decree shall order such accounts and enquiries to be taken and made and give such other directions as it thinks fit." As regards suits for dissolution of partnership section 215 provided that "the Court before making its decree may pass an order fixing a date on which the partnership shall stand dissolved and directing such accounts to be

(1) (1913), 18 C. L. J. 223 (237).

(2) (1890) L. R. 18 I. A. 6 (7); I. L. R. 15 Bom. 155.



taken and other acts to be done as it thinks fit." So too, under section 215 A, in a suit for accounts between principal and agent, "the Court shall before making its decree pass an order directing such accounts to be taken as it thinks fit." In suits to enforce a mortgage the provisions of the Transfer of Property Act did not require that a mortgage decree under section 88 should be followed by any supplemental decree, but only, if necessary, by an application for an order absolute for sale under section 89. This was clearly brought out by Sir Lawrence Jenkins in *Amlook Chand v. Surat Chunder* (1). The order absolute for sale was regarded as an order for the realization of the decree or as an order giving the plaintiff execution for the amount of the decree. Under the Code of 1882, however, the general definition of decree was wide enough to cover orders, if these were formal expressions of adjudication upon any right, claim or defence set up in a Civil Court when such adjudication, so far as regards the Court passing it, decided the suit or appeal, so that many orders were appealable as being decrees. Other orders were made appealable by section 588 and by section 591 it was provided as regards all orders that "if any decree be appealed against, any error, defect or irregularity in any such order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal."

The Code of 1908, by providing for preliminary and final decrees, introduced a uniform practice for many different classes of suits, and by section 97 provided that "where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree." This last provision is also applied, by section 105, clause (2), to orders of remand from which an appeal lies. The difficulties which have been referred to us for solution arise from these provisions. A litigant, aggrieved by a preliminary decree cannot seek a remedy for his grievance in an appeal from the final decree; a litigant aggrieved by an order of remand from which an appeal lies, must appeal therefrom directly, or be precluded from disputing its correctness.

The decisions from which the Division Bench has in this case dissented are decisions which purport, in the altered circumstances, to apply or adopt principles which the Court had applied under the Code of 1882. Under the old Code the first decision

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(1) (1911) I. L. R. 33 Calc. 913 (910).

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to be noticed is that of *Jatinga Valley Tea Company* (1). The suit was for possession of land. The first Court had given the plaintiff a decree and the lower appellate Court remanded the case for a local investigation. Thereupon, it would seem that the plaintiff appealed to the High Court against the order of remand and that subsequent thereto, the trial Court had proceeded with the case and passed a decree dismissing the plaintiff's suit. Whether this decree was made before or after the presentation of the appeal to the High Court is not quite clear from the report and the original record of the appeal throws no light on the question. It may be taken, however, that the presentation of the appeal preceded the dismissal of the suit. In the High Court it was contended that the existence of the final decree was a bar to the hearing of the appeal. This contention was rejected on the ground that section 588 of the Code gave an appeal in such a case. Field J. said "that provision is not, in any way, qualified. The Code does not say that there shall be an appeal only if the case has not been finally determined in the Court of first instance, before that appeal is preferred or comes on for hearing." The Court not only set aside the order of remand but set aside the decree which had been made upon it and which was held to be based upon it.

Twenty years afterwards, in *Madhu Sudan Sen v. Kamini Kanta Sen* (2) the question again arose in a suit for ejectment. The Munsif had dismissed the suit; the Subordinate Judge had ordered a remand for the trial of certain issue; before the defendant appealed to the High Court from the order of remand, the Munsiff had tried the suit for the second time and had made a decree in favour of the plaintiff *ex parte*. Maclean C. J. and Mitra J. held the appeal to be incompetent and the decision in this case lies at the root of the present difficulty. The Court distinguished the *Jatinga Valley* case (1) on the ground that the appeal from the order of remand had been presented before the suit had been dismissed. Maclean C. J. reasons that the orders specified in section 588 comprise first of all some whose force lasts only as long as the suit is pending and that the right of appeal from such orders should cease with the disposal of the suit. He admits, however, that other orders do affect the decision on the merits and that an order of remand is of this nature. He observes that section 588 makes no distinction between these two classes and that "a party failing to appeal from an order of remand is not

(1) (1883), I. L. R. 12 Calc. 45.

(2) (1905) I. L. R. 32 Calc. 1023.

without a remedy. He may appeal from the final decision and on that appeal take exception to the validity of the order of remand." He concludes therefore "If a party desire to avail himself of the privilege conferred by section 588 in relation to an order of remand, he ought to do so before the final disposal of the suit. He cannot be permitted to wait until after the final disposal of the suit and then to appeal against the interlocutory order without appealing from the decree in the suit."

Now, the judgment of Field J. in the *Jatinga Valley* case (1) had pointed out that section 588 contains no such qualification of the right of appeal. In subsequent cases the reasoning of Sir Francis Maclean has on this ground been condemned as a matter of construction (see *Lakshmi v. Maru Devi* (2), *Kanhaiya Lal v. Tirbeni* (3). Again, to say that section 588 of the Code deals with two classes of orders—those which do not affect the decision of the case and those which do—is to give no very strong reason for laying down a rule for both which is appropriate to the former only. There is no doubt a distinct convenience to be gained by requiring a litigant, when he brings his appeal, to attack the final decree if such a decree has been passed. This, however, depends entirely upon the right of the appellant to challenge the previous decree in his appeal from the later one, and it has to be remembered that in a case where the appeal has been brought before the final decree had been passed, the advantage aimed at by this decision is unattainable. It may here be observed that the language of Maclean C. J., though clear enough with reference to the Code of 1882, has given rise to some confusion. When it was said that the appellant cannot be permitted to wait until after the final disposal of the suit and then to appeal against an interlocutory order without appealing from the decree in the suit, it was not meant that one appeal would be competent or incompetent according as another had been brought or not brought. What was meant was that after a final decree had been passed, an appeal from an interlocutory order was incompetent as such, but that in an appeal from the decree an interlocutory order could be reversed or varied if it affected the decision of the suit. Maclean C. J. was not arguing for two appeals but for one appeal in which the whole case would be disposed of.

The next case was that of *Mackensie v. Narsingh Sakai* (4). This

(1) (1885) I. L. R. 12 Calc. 45.

(2) (1911) I. L. R. 37 Mad. 292.

(3) (1914) I. L. R. 36 All. 532 per Chamber J. at 537.

(4) (1909) I. L. R. 36 Cal. 762; 10 C. L. J. 113.

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was a partition suit and the appeal from the preliminary decree (so to call it though it was made in 1907) was not preferred until the final decree had been passed. A Division Bench held that a preliminary decree was subject to the rule laid down in *Madhu Sudan's* case (1) for interlocutory orders. This was said to be obvious and to follow from the application of a simple test. The test was as follows: "If this appeal is heard on the merits and the preliminary judgment of the Subordinate Judge set aside, what would be the position of the parties? The final decree, which up to the present moment has not been questioned by way of appeal, would still stand and that decree would entitle the plaintiff to eject the appellant. If the appeal is heard and decided in favour of the appellant, in order to give him any relief, the final decree against which no appeal has been preferred would have to be indirectly set aside. It is difficult to appreciate how such a state of things could possibly have been contemplated by the Legislature." This case, though decided in 1909 was decided under the Code of 1832 and it appears to be the first case to treat a preliminary decree as on the same footing as an interlocutory order made immediately appealable by section 588 of the old Code. The basis of the reasoning is that the final decree, unless directly and formally attacked, will remain unaffected though the preliminary decree be set aside. The case does not explain the principles upon which the presentation of an appeal from the preliminary decree before the final decree is passed enables a final decree to be set aside indirectly without formal and direct attack.

*Janki Nath v. Promotho* (2) was the first case under the new Code in which these doctrines were applied. They were applied to an appeal against an order of remand—the appeal being filed after the disposal of the suit upon remand. They were applied notwithstanding the new provision in section 105(2) upon which the only observation made was that this clause "does not meet the present case but applies rather to the converse case." The learned Judges failed to observe that this clause had made any difference at all to the reasoning of Maclean C. J. in *Madhu Sudan's* case (1) (Supra) or even that it had affected the doctrine as to "election of alternative remedies" laid down by Mookerjee J. in the case of *Baikuntha v. Nawab Salimulla* (3) under the Code of 1882.

Leaving aside cases in which the presentation of the appeal from the preliminary decree preceded the passing of the final decree, I

(1) (1905) I. L. R. 32 Calc. 1023.

(2) (1911) 15 C. W. N. 830.

(3) (1907) 6 C. L. J. 547; 12 C. W. 590.

come next to the case of *Khirodamoyi v. Adhar* (1). This case was governed entirely by the Code of 1908 but the principles of *Mackenzie's* case (2) were applied to it. It was laid down that whether or not an appeal has been preferred against the preliminary decree before the final decree has been passed, it is the duty of the party aggrieved by the final decree to prefer an appeal against the final decree if he desires a remedy; and it was further held that in either case an appeal against the preliminary decree alone would be useless. In this respect, it will be seen, this decision goes beyond *Mackenzie's* case (2) and beyond *Madhu Sudan's* case (3). Of section 97 of the new Code it was observed "That section does not, however, relieve the person who appeals from the preliminary decree from the necessity of appealing against the final decree nor does it provide how, if the preliminary decree is contrary to the terms of the final decree, the final decree is to be interfered with after it has been allowed to stand without any appeal being preferred against it." In the end, however and inconsistently with their reasoning, the learned Judges appear to fall back upon the consideration that the appeal was presented after the final decree had been pronounced. The logic of this case would appear to be that nothing which can happen upon an appeal against a preliminary decree can affect the final decree and in keeping with this view no suggestion is offered as to any principle according to which the final decree can be held to stand or fall according as an appeal against the preliminary decree was preferred before or after the making of the final decree.

The next case is the Madras case already referred to—*Lakshmi v. Maru Devi* (4). The appeal in this case was against a preliminary order in execution and it was not filed until after the date of the final order. The decision contains a criticism of the Calcutta cases to which I have referred. It lays down that the final order merely carries out the former order and does not supersede it; that the final order could not affect or take away the right of appeal against the preliminary order; that the final order depends for its authority upon the preliminary order and that upon the quashing of the latter it would cease to have any force; that under section 97 a party whose grievance is against the preliminary order is bound to appeal against it and cannot dispute its correctness in any appeal from the final order; that

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(3) (1905) I. L. R. 32 Cal. 1023.

(4) (1911) I. L. R. 37 Mad. 29.

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in these circumstances, he may have no grievance which he can raise against the final order and an appeal therefrom would be an empty formality. In *Bhagaban Chandra v. Ishan Chandra* (1) the final decree was passed on the 11th of November though not drawn up or signed till the 18th November. On the 16th November an appeal was preferred against the preliminary decree. Fletcher, J., after pointing out that on the 16th of November the only decree against which the appellant could appeal was the preliminary decree, referred to a previous decision of his own in *Atul Chandra v. Kunja Behari* (2) saying "the right of appeal is given by section 97 Civil Procedure Code is one that is not taken away by the mere fact that the Judge has passed a final decree". In *Atul's* case (2) the presentation of the appeal had preceded the passing of the final decree and the Court held that if the appeal succeeded, the final decree ought to be amended in accordance with the result of the appeal.

In *Kulada Prosad v. Ramananda* (3) the preliminary decree in a suit to enforce a mortgage had been followed by the final decree, before the defendants filed an appeal against the preliminary decree. Mookerjee, J. reaffirmed the principles upon which he had decided the case of *Muchensis v. Narsingh Sahu* (4) "If we were now to reverse the preliminary decree at the instance of the appellant, the final decree would still remain unaffected as no appeal has been made to challenge the propriety of that decree." Referring to *Khirdamoy's* case (5) he says but, not so far as I can see, correctly, that it was ruled "that the final decree must be deemed to have been made on the assumption that if the preliminary decree should be modified or set aside in the appeal, the final decree also would be similarly modified or set aside." In this case, however, the Court allowed the appellant to amend his memorandum of appeal so as to turn it into an appeal against both decrees. Again in *Nanibala v. Ichhamoyee* (6) the same learned Judge reaffirmed the principles that the right of appeal from interlocutory orders ceases after the disposal of the suit, and that this rule is applicable to cases in which there is a preliminary decree and a final decree. Distinguishing certain cases in which the appeal against the preliminary decree had been lodged before the final decree was made, he says "It was ruled that the final decree must be deemed a contingent decree or in the words of Turner

(1) (1918) 22 C. W. N. 831.

(2) (1915) 22 C. L. J. 90.

(3) (1921) I. L. R. 48 Calc. 1036; 33 C. L. J. 414.

(4) (1909) I. L. R. 36 Calc. 762; 10 C. L. J. 113.

(5) (1912) 18 C. L. J. 321.

(6) (1923) 40 C. L. J. 291.

L. J. in *Shama Purshad v. Harro Purshad* (1) a subordinate and dependent decree liable to be superseded by the modification or reversal of the preliminary decree which was the subject-matter of appeal before a superior tribunal when the final decree was made on the basis thereof in the primary Court." In this case also resort was had to the device of amending the memorandum of appeal so as to enlarge its scope and convert it into a combined appeal against both the preliminary and the final decree.

Where an appeal has been brought from the preliminary decree before the final decree has been passed, this Court has consistently held that such appeal is competent and that if the preliminary decree be set aside the final decree falls to the ground along with it. In these cases attempt has been made to induce the Court to affirm that the passing of a final decree takes away from the appellate Court its jurisdiction over the appeal already lodged against the preliminary decree; or else to hold that the final decree is valid and subsisting until set aside formally and directly by an appeal therefrom. *Ram Nath v. Basanta* (2) like the case now before this Court, arose out of an application to enforce a final decree in execution. The suit was for an account. "At the time when he preferred the appeal no final decree had been passed. The appellate Court therefore certainly had jurisdiction to hear the appeal and that power...was not taken away by the final decree.... The final decree in the case which merely determined the amount for which the defendant was liable to the plaintiff was dependent upon the preliminary decree which held that the defendant was liable to render accounts and the validity of the proceedings which resulted in the final decree depended upon the preliminary decree itself; and that decree having been set aside on appeal, the final decree necessarily fell through. "It has next been contended that it was, at any rate, necessary to have the final decree formally set aside and that, at all events, the question could not be gone into in execution proceedings and that the executing Court has no power to deal with the matter. We think, however, that the final decree was superseded by the order of the Appellate Court setting aside the preliminary decree upon which it depended." "We are further of opinion that it is perfectly open to the executing Court to determine whether the decree which it is asked to execute is a subsisting and operative decree or not and if such a decree has been superseded and is no longer operative, the execut-

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(1) (1865) 10, M. I. A. 203.

(2) (1913) 18 C. L. J. 209; 17 C. W. N. 863.

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ing Court is entitled to refuse execution on that ground." It will be noticed that in this reasoning the subordinate and dependent character of the final decree is rested not upon the fact of an appeal having been presented in the interim but upon the essential character of that decree and the nature of its relation to the preliminary decree. In *Nistarini v. Rai Mohun* (1) Mookerjee J. rested it upon this: "The party who obtained the final decree, in his favour took it while the preliminary decree was under appeal. The final decree therefore must be deemed subject to the result of that appeal."

In *Kankai Lal v. Tirbeni* (2)—a decision of a Full Bench of the Allahabad High Court—the fact that the appeal against the preliminary decree had been filed before the passing of the final decree was not made the basis of the decision. The basis of the decision was the necessary dependence of the final decree upon the preliminary decree on which it was based. The Calcutta decisions were said to proceed on the basis that the final decree continued after the preliminary decree had been set aside—a view which was held to be erroneous.

In *Wahidunnissa's* case (3) Chamier C. J. adhered to the Allahabad decision and Sharfuddin J. affirmed that "a preliminary decree...has existence independent of the final decree..... and the final decree instead of extinguishing a preliminary decree gives effect to it"

It will be seen, therefore, that in this Court the decisions have followed two distinct lines according as the appeal from the preliminary decree was lodged before or after the final decree was passed. No difficulty has been felt in the former case. In the latter case it was not possible to say under the Code of 1908 that the appeal from the preliminary decree was incompetent, but it was said that its competence depended upon the bringing of another appeal from the final decree itself. The first effective challenge to this doctrine was made in *Kanath v. Himmat Ali* (4): B. B. Ghose, J. said "In my opinion therefore where a preliminary decree has an independent existence and a person aggrieved by it is bound to appeal from it, that right cannot be taken away by a final decree being passed either before or after the person appeals from the preliminary decree." The order of reference in the present case repeats and amplifies this reasoning.

(1) 1913) 18 C. L. J. 214.

(2) (1914) 1 L. R. 36 All. 532.

(3) (1916) 20 C. W. N. 1174.

(4) (1928) 48 C. L. J. 28; 32 C. W. N. 858.



In my judgment it is altogether unreasonable to treat a preliminary decree under the Code of 1908 as a mere interlocutory order whose force is spent when the suit is disposed of. The definition given by section 2 of the Code makes a decree preliminary "when further proceedings have to be taken before the suit can be completely disposed of." This certainly is a lame definition and if it were taken strictly one might well ask how any decree could be partly preliminary and partly final. In mortgage or partition suits, in suits for partnership or other accounts, the preliminary decree is what in the Court of Chancery would have been described simply as "the decree"; the final decree corresponds to the "order on further consideration." The "further proceedings" are proceedings under the preliminary decree and consists mainly of what Lord Hobhouse in *Syed Muskar Hussain v. Bodha Bibi* (1) described as 'subordinate enquiries'. Section 97 has expressly excepted preliminary decrees from the position assigned to interlocutory orders, precluding an appellant from impeaching them in the course of an attack upon the final decree. If there be any general doctrine of law to the effect that interlocutory orders cease to have any effect after the final disposal of the suit and that therefore they lose their appealable character upon the passing of the final decree—and I do not here affirm such doctrine—it is in my judgment reasonably clear that preliminary decrees, under the Code of 1908, which determine such questions as liability to account, existence of a mortgage, share in joint property, are altogether outside its scope.

In the second place I think it wrong to hold that the presentation of an appeal from the final decree is a circumstance which renders the final decree contingent upon the result of the appeal, or creates in the final decree a character of dependence or subordination. In my judgment the final decree is, in its nature, dependent and subordinate because it is a decree which has been passed as a result of proceedings directed and controlled by the preliminary decree and based thereon. A final decree when passed is capable of immediate execution and the presentation of an appeal from the preliminary decree does not operate as a stay of execution. The Court which passes a final decree need not necessarily have before it the circumstance that an appeal from the preliminary decree has been presented. Whether such an appeal has been presented and whether or not

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(1) (1894) L. R. 22 I. A., 1 (4); I. L. R. 17 All. 112.

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the attention of the Court has been brought to these matters in no way qualify the final decree when made.

Again, the doctrine that subordinate and dependent decrees come to nothing when the decree on which they are dependent is set aside must now be viewed in the light of the decision of the Judicial Committee in *Bammadevar's case* (1). *Shama Purshad's case* (2) has for years been taken as extending this doctrine very widely but the decision of the majority of the Full Bench in *Jogesh Chunder Dutt v. Kali Churn Dutt* (3), has now been overruled. In a case such as the present, however I see no reason for holding that the final decree is not a subordinate and dependent decree. It is as an order for the execution of a decree subordinate and dependent on the decree which is being executed. The function of the final decree is merely to restate and apply with precision what the preliminary decree has ordained. The decrees are in the same suit. The appellate Court, if it has power over the preliminary decree at all—power to reverse it or vary it—has power to affect the final decree. In a redemption suit, such as we are now concerned with, it has power to see whether there has been any mortgage and, if so, upon what basis the plaintiff should be permitted to redeem. There is no intermediate position between the view that the mere existence of a final decree takes away all power from the appellate Court over the preliminary decree and the view that the appellate Court being competent to hear the appeal from the preliminary decree has necessarily the right to set aside the final decree and any other proceedings based upon the decree under appeal. With the solitary exception of *Khirodamoy's case* (4) opinion in this case has been unanimous to the effect that the existence of a final decree does not deprive the appellate Court of its power to hear an appeal previously presented against the preliminary decree.

It appears to me that in this matter we should take our stand upon the express provisions of the Code and refuse to read into the Code qualifications and conditions of which it contains no sign. I respectfully adopt the language of Chamier J. in *Kankaiya Lal's case* (5): "The Code gives a right of appeal against a preliminary decree and further provides that where any party aggrieved by a preliminary decree passed after the

(1) (1923) L. R. 50 I. A. 301; 39 C. L. J. 312.

(2) (1865) 10 M. I. A. 203.

(4) (1912) 18 C. L. J. 321.

(3) (1877) I. L. R. 3 Cal. 30.

(5) (1914) I. L. R. 36 All. 532 (536).

commencement of this Court does not appeal from such decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. It seems to me that we are not at liberty to read into the Court any provision to the effect that the passing of the final decree shall be a bar either to the institution or the hearing of any appeal against the preliminary decree." I would add that when a preliminary decree is set aside the final decree is superseded whether the appeal was brought before or after the passing of the final decree and that in my judgment an appellate Court when setting aside or varying a preliminary decree can, and indeed should, give directions for the setting aside or the varying of the final decree if the existence of the final decree is brought to its notice as in all cases it ought to be. In the present case the preliminary decree affirming the existence of a mortgage has been set aside and the plaintiff's suit has been dismissed. But be the question clear or difficult, I am of opinion that Court of execution is entitled to enquire whether the final decree originally passed is still subsisting or has ceased to have effect. It does so when a decree has been reversed: it must do so when a decree has been superseded. No doubt had *Shama Purshad's* case (1) stood unexplained there would have been some difficulty here and it is true that the present class of case was not considered by the Full Bench in *Gora Chand's* case (2). But on this point the reasoning of Chatterjea and Walmsley JJ. in *Ram Nath v. Basanta Narain* (3) is in my opinion sound and should be followed.

I would answer in the negative both of the questions which have been referred to us. In my opinion the appeal should be dismissed with cost before the Division Bench and before us. Consolidated hearing fee before both Benches is fixed at ten gold mohurs.

C. C. Ghose, J: I agree.

Buckland, J: I agree.

B. B. Ghose, J: I am entirely of the same opinion. As one of the referring Judges I am glad that the cobwebs which disfigured the procedure of our Courts for a great many years have been swept away by the judgment of my Lord, the Chief Justice just pronounced.

Mukerji, J: I agree.

A. T. M.

*Appeal dismissed.*

(1) (1865) 10 M. I. A. 203.

(2) (1925) I. L. R. 53 Cal. 166; 42 C. L. J. 1.

(3) (1913) 18 C. L. J. 209; 17 C. W. N. 868.

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## APPELLATE CRIMINAL

*Before Mr. Justice Graham and Mr. Justice Lort-Williams.*

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August, 6, 9.

TAFIZ PRAMANIK AND OTHERS

v.

KING-EMPEROR.\*

*Admissibility in evidence—Deposition of Sub-Inspector in the Committing Court—Dying declaration recorded by Sub-Inspector—Death of Sub-Inspector before trial in Sessions Court—Evidence Act, (I of 1872), Sec. 33—Opportunity to cross-examine—Criminal Procedure Code (Act V of 1898), Secs. 208(2), 288—Deposition of witness put in in the Sessions Court.*

The method of proving a dying declaration, and the method as usually adopted, is to examine the person who recorded the statement as to what the deceased said, or to examine some person or persons who were present at the time and heard the statement being made.

The Sub-Inspector of Police who took the dying declaration was examined in the Committing Court, but he died before the Sessions trial. The prosecution sought to put in the deposition of the Sub-Inspector under section 33 of the Evidence Act. The Sessions Judge held that it could not be admitted in evidence on the ground that no specific opportunity had been given to cross-examine the witness. While however disallowing the prayer to put in the deposition, he directed that portion of the statement itself as recorded by the Sub-Inspector, in which the names of the deceased's assailants were mentioned, might go in on the ground that some of the witnesses had deposed to those statements as having been made by the deceased in their presence to the Sub-Inspector.

*Held*, that the dying declaration could not as such be admitted in evidence.

That the Judge erred in admitting portions of the statement in evidence.

That the deposition of the Police Sub-Inspector was admissible under section 33 of the Evidence Act, as there was opportunity to cross-examine the Sub-Inspector, if the accused had chosen to exercise their right under section 208(2) of the Code of Criminal Procedure.

Deposition of a witness put in by the defence under section 288 of the Code of Criminal Procedure was evidence in the Sessions Court and it was open to the jury to believe that evidence if they so wished.

Appeal by the Accused under section 410 of the Code of Criminal Procedure.

The material facts appear from the judgment.

*Messrs. K. N. Chaudhury, Mrityunjoy Chattopadhyaya and Manindra Nath Banerjee* for the Petitioners.

\* Criminal Appeal No. 141 of 1929, against the decision of Jatindra Chandra Lahiri Esq., Sessions Judge of Pabna, dated the 11th January, 1929.

*Mr. Debendra Narain Bhattacharyya* for the Crown.

C. A. V.

The following judgments were delivered :

**Graham, J :—**This is an appeal by ten persons who have been convicted under sections 147 and 304 read with section 149 Indian Penal Code and sentenced to one year's rigorous imprisonment and six years rigorous imprisonment respectively, the sentences being directed to run concurrently. The appellants Nos. 2, 3, 4, 5 and 9 have also been convicted under section 323 Indian Penal Code and sentenced to six months rigorous imprisonment.

The case for the prosecution was that at about 11 P. M. on the night of the 19th April last one Mayan Khan, who died subsequently as the result of certain injuries received, hearing a noise in his cowshed went outside, that he was thereupon seized by a number of people who dragged him along and trampled upon him and beat him severely. His brother Ayen Khan who went to his aid is also alleged to have been beaten. Several of Mayan's ribs were broken and he died on the following day. At about midnight he had been brought to the house of one Jayan Pramanik. Information of the occurrence was lodged at the Thana about a mile distant at 5 P. M. next morning. In the course of the investigation which followed a dying declaration was made by Mayan to the Sub-Inspector of Police. The Sub-Inspector was examined in the Committing Court to prove this, but he died before the Sessions trial. The prosecution sought to put in the deposition of the Sub-Inspector under section 33 of the Evidence Act. The learned Sessions Judge held that it could not be admitted in evidence on the ground that no specific opportunity had been given to cross-examine the witness. While however disallowing the prayer to put in the deposition the learned Judge directed that portions of the statement itself as recorded by the Sub-Inspector, in which the names of Mayan Khan's assailants are mentioned, might go in on the ground that some of the witnesses had deposed to those statements as having been made by Mayan Khan in their presence to the Sub-Inspector. These facts are referred to because one of the main points in the appeal is connected with this dying declaration.

The accused all pleaded not guilty to the charges but do not appear to have set up any very definite defence. Some of them pleaded enmity and the accused Rahimuddi pleaded an alibi.

On behalf of the appellants objections have been taken to the learned Sessions Judge's charge upon several grounds. The ground

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upon which most stress was laid was that the learned Judge having rejected the dying declaration as inadmissible misdirected the jury by placing before them certain portions thereof relating to the names of the accused. Now the dying declaration could not as such be admitted in evidence. The method of proving such a statement, and the method, which so far as my experience goes as usually adopted, is to examine the person who recorded the statement as to what the deceased said, or to examine some person or persons who were present at the time and heard the statement being made. In this view of the matter the learned Sessions Judge erred in my opinion in admitting portions of the statement in evidence. It appears that those portions were exhibited, as the order of the 10th January 1929 shows. In my judgment too the statement itself as recorded must either go in as a whole or not at all. If it is inadmissible, no portion of it should be allowed to go in evidence.

At the same time the learned Judge in my opinion was in error in holding that the deposition of the Police Sub-Inspector, which was recorded in the Committing Court, could not be admitted in evidence, the ground given by him for so holding being that specific opportunity had not been given to the defence to cross-examine the witness. Section 33 of the Evidence Act provides *inter alia* that the adverse party must have had the right and opportunity to cross-examine. There can be no doubt that the defence had that right under section 208(a) of the Code of Criminal Procedure, and I do not see how it can be said that they had not the opportunity. If they wished to exercise their right, it seems to me that it was incumbent upon them to claim it. The fact that they did not do so can only give rise to the inference that they did not wish to cross-examine in that Court, and that they reserved the cross-examination for the Sessions Court. The adoption of that course necessarily involves some risk, though it is not a risk which would ordinarily be deemed to be a serious one.

In my judgment it is a case for the application of the maxim '*omnia presumuntur rite esse acta*.' It can fairly be assumed that there was opportunity to cross-examine the witness if the accused had chosen to exercise their right. The assumption it seems to me is that it existed and not the contrary. Now if the deposition had been admitted, as I hold it should have been, it is clear that it would have been to the disadvantage of the accused, because in that case the whole statement would have gone in instead of only a portion. To that extent the advantage is with the accused. But

it is objected in this connection that, if the whole deposition had been admitted, the defence would have been able to cross-examine some of the witnesses, who have deposed concerning it, with a view to showing what really took place and discrediting the statement as recorded, as for example by proving that leading questions were put by the Sub-Inspector. We find however that as the result of the admission of a part of the dying declaration some of the witnesses were in fact cross-examined with the above object in view, and, that being so, there does not seem to be much substance in this objection, or in the objections generally with regard to the dying declaration.

The next point which was argued on behalf of the appellants was that the learned Judge misdirected the jury in telling them that they were to discard the evidence of certain prosecution witnesses as their story was inconsistent with the prosecution version, and the Public Prosecutor had thought fit to declare them hostile; whereas he ought to have made it clear to the jury that, although the prosecution was not entitled to rely on any part of the testimony of those witnesses, it was open to the jury to rely on their evidence in so far as it contradicted, or was inconsistent with the prosecution case and supported the defence version. If this ground and especially the first part of it had been substantiated, we should undoubtedly hold that there had been misdirection. The learned Judge does not however appear to have given any such direction. He certainly has not put it in the form in which it has been stated in ground No. 2 of the memorandum of appeal. The only passage in the charge which appears to support the contention on this point is at page 10 thereof where this passage occurs—"This witness (the Judge is here referring to P. W. 2 Kafiluddin) should be wholly disbelieved for in the lower Court he did not give such a version". That direction was apparently meant to be in favour of the defence, for it seems to amount to this that the Judge told the jury that this witness having given two different versions ought not to be believed. In substance that appears to be a proper direction. It is complained however that the Judge omitted to tell the jury that it was open to them to believe the evidence which this witness had given in the committing Court. The deposition of this witness was however put in by the defence under section 288 Criminal Procedure Code and it was therefore evidence in the case and it was open to the jury to believe that evidence if they so wished.

The next ground of objection is that the learned Judge omitted

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to draw the attention of the jury to the delay in lodging the First Information. The facts in this connection are that the occurrence took place at 11 o'clock at night and the information was lodged at the Thana one mile distant at 5 a. m. the following morning. It cannot be said that there was any inordinate delay so as to impose on the Judge the duty of drawing the particular attention of the Jury to it.

It was next argued that the Judge should have drawn the attention of the jury to certain facts referred to in ground No. 4 of the Petition of Appeal. This relates to details and it is obviously not possible for a Judge to refer to every fact in his charge. We do not think that the omission to refer to the particular matters mentioned in this ground can be held to amount to misdirection.

Grounds Nos. 6, 7 and 8 in the memorandum of appeal were not pressed by the learned Advocate for the appellants in view of the explanation which has been submitted by the Sessions Judge, and we think that the learned Advocate in the circumstances very properly adopted this course. At the same time the legal advisers of the appellants cannot be altogether excused for making these somewhat reckless allegations, in particular the allegation contained in ground No. 6, which is to the effect that the Judge misdirected the Jury in telling them that, if there had been any reasonable doubt about the guilt of the accused, they would not have been committed to the Court of Sessions. It is not in the least likely that the learned Judge would have given any such direction in his charge, and he has categorically denied that he did so, and we accept his statement. The importance of the matter is this that appeals are sometimes admitted on such statements in the grounds of appeal, and grounds of appeal ought to be carefully drawn up and with a due sense of responsibility.

Grounds Nos. 19, 21 and 22 were also briefly referred to, but were not seriously pressed, and we do not think that there is anything in them which would amount to misdirection.

In the result all the grounds which have been urged fail, the appeal is dismissed and the convictions and sentences are confirmed.

Lort-Williams, J: I agree.

A. T. M.

*Appeal dismissed.*



## CRIMINAL REVISION.

*Before Sir George Claus Rankin, Knight, Chief Justice,  
and Mr. Justice Patterson.*

CRIMINAL.

1929.

August, 7, 9.

ASHUTOSH GHOSE AND ANOTHER

v.

KING-EMPEROR.\*

*Landlord and tenant—Interfering with water supply—Tenant suffering from  
scarcity of fresh water—Indian Penal Code (Act XLV of 1860), Sec. 430—  
Right infringed—Intention—Proper course for tenant to follow*

A certain Abad, which a few years ago jungle, was made cultivable to some extent by raising Bunds to protect it from rivers which surrounded it on three sides. It was divided into three Chaks. The complainants were the tenants of one of these Chaks. In this Abad, there were a large number of small as well as some large Khals and the opening of the large Khals was controlled or closed by sluice gates. In the ordinary way during the rains these Khals got filled with rain water which was not saline or not so saline as the river water. After the rains and at a time when there were no crops or agricultural operations going on, the Malik recently made up their mind to fish in a special manner, that is to say, by cutting the Bunds of the small Khals so as to let out a considerable amount of water and then placing what is called Khait or obstruction of some kind at intervals along the small Khals and bailing the water out into the next higher part. For purposes of fishing in this manner, the Malik for the first time emptied out all the small Khals with the result that the tenants of the Chak suffered from a scarcity of fresh water.

*Held*, that before the landlords or their agents could be convicted under section 430 of the Indian Penal Code for interfering with the water supply, it must be made abundantly clear that the landlords could not have a right to do what they did with reference to the Khals. If the tenants had no legal claim to have the water in these Khals preserved in such a way that they could use it either for purposes of agriculture or otherwise then, though the conduct of the landlords might be very shabby or very objectionable, it was not an offence under section 430 of the Indian Penal Code, the essence of which was that they intentionally inflicted wrongful loss upon the tenants. Such a case could only succeed where the right infringed was reasonably clear and plain. A complicated question of civil law was to be considered before it could be decided whether the tenants had any actual right to this water or not.

The proper course for the tenants, if they desire to assert a right to have the water in these Khals kept in such a way as they could use it, was to take pro-

\* Criminal Revision No. 23 of 1929, against the order of H. Quinton Esq., District Magistrate of Khulna, dated the 8th November, 1928, affirming that of Babu B. N. Maitra, Sub-Deputy Magistrate of Khulna, dated the 15th August, 1928.

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ceedings for an injunction in a Civil Court or to take measures by which the rights of the parties could effectively be ascertained.

Application for Revision under section 435 of the Code of Criminal Procedure by the Accused.

The accused, two in number, were convicted under section 430, Indian Penal Code and sentenced to pay a fine of Rs. 200 each, in default, rigorous imprisonment for 6 months each.

The material facts appear from the judgment.

*Messrs. Narendra Kumar Bose and Anil Chandra Roy Chaudhury* for the Petitioners.

C. A. V.

The following judgments were delivered :

August, 9.

**Rankin, C. J. :—**In this case the two petitioners have been convicted under section 430 Indian Penal Code for the particular form of mischief which consists in interfering with the water-supply of a particular Abad called Maheshwaripur Abad. It appears that the petitioner Ashutosh Ghose is the manager and the petitioner Nripendra Nath Prodhania is the Naib of the landlords of this Abad. It would appear to be a very large place which some few years ago was a jungle and which has been made cultivable to some extent by raising Bunds to protect it from rivers which surround it on three sides. It is divided into three Chaks and we are concerned with Chak No. 3, it being the northernmost Chak. In the Abad there are a large number of small and also some large Khals and the opening of the large Khals is controlled or closed by sluice gates. The actual condition of the Abad is not very clear at least to me upon the evidence and I cannot gather how many of the large Khals are within the particular Chak No. 3 with which we are concerned, but a number of small Khals certainly are.

In the ordinary way during the rains these Khals get filled with rain water which is not saline or not so saline as the river water. No question seems to arise in this case of the letting in of river water upon these lands, but the complaint is this that after the rains and at a time when there are no crops or agricultural operations going on the Malikhs were minded to make some revenue out of the fishery right in these different Khals. As regards the larger Khals, they are fished by nets. As regards the smaller Khals, for the first time, as the prosecution alleged, the Malikhs made up their mind to fish in a special manner, that is to say, by cutting the Bunds of the small Khals so as to let out a considerable amount of water and then placing what is called Khait or obstruction of some

kind at intervals along the small Khals and baling the water out into the next higher part. For purposes of fishing in this manner, the Malik for the first time emptied out all the small Khals with the result that the tenants of Chak No. 3 suffered from a scarcity of fresh water.

On the findings of the Courts below it would appear that the tenants and the landlords have of late been at daggers drawn, the landlords in some cases having taken Kabuliats at a higher rent and the tenants refusing thereafter to pay. It would also appear from the findings that method of fishing adopted was adopted for the first time on this occasion and the inferences of the Courts below are to the effect that the landlords being minded to pay back the refractory tenants adopted this particular method of fishing with a view to harass them with the intention that they should not have sufficient water either for their own domestic purposes or for their cattle or for agriculture.

Before we come to have a duty to consider whether the action of the landlords was a piece of intentional oppression or not, it is quite evident that before the landlords or their agents can be convicted under section 430 Indian Penal Code it must be made absolutely clear that the landlords could not have a right to do what they did with reference to these small Khals. If the tenants have no legal claim to have the water in these Khals preserved in such a way that they can use it either for purposes of agriculture or otherwise then, while the conduct of the landlords may be very shabby or very objectionable, it is not an offence under section 430 the essence of which is that they have intentionally inflicted wrongful loss upon the tenants. This was a point which was taken as appears clearly enough from the judgment of the Court of appeal. It appears that the matter was put in this way:—"The main point urged before me was that admitting for the sake of argument the facts alleged, there has been no infringement of tenants' rights so that there can be no offence under section 430 Penal Code." Then the learned Judge refers to certain rulings and says that they lay down the principle that for a conviction under section 430 there must be some infringement of right resting in B by the act of A. That proposition urged on the part of the defence is incontestable and the appellate Court deals with the matter in the end in the following way "The issue then comes to this: Did the appellants know they were likely to cause or did they intend to cause wrongful loss or damage by draining the Khals ostensibly for fishing to complainant and other tenants? Did they

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at least know they were infringing a right of the tenants not to use the water for cattle and agriculture. I think these questions must be answered in the affirmative."

"In Abad areas entirely surrounded by Bunds agriculture depends entirely on their efficiency as much as it depends upon the soil, sun and rain."

"It is also in evidence from P. Ws. that the Maliks gave assurance to the tenants they could use the water. I doubt that any such definite assurance was given, but that such an assurance was implied in the contract between tenants and zemindars. I have no doubt. The cutting of an Abad Bund entirely without regard to the interests of the tenants is in my opinion an infringement of a natural right which is implicit in the Kabuliya."

In my judgment, this is much too summary a method to deal with what may well be a somewhat complicated question of the law of easement of profits. To my mind, if there is to be a conviction in this case on the ground that the tenants have a right that at all times of the year this water is to be kept for their use although the Khals admittedly belong to the landlords and although the landlords have admittedly the right to settle them with fishermen in order to make a profit, it is necessary that the question of the nature of the tenants' right should be somewhat more carefully considered than it is easy to do in a Police Court or as has been done in the judgment of the learned Court of appeal. To begin with, if one is to hold that something is implied in a contract between the parties, it is very necessary not only that the nature of the land should be most carefully explained with reference to the position of the Khals—where the larger Khals are as well as the smaller ones, but the circumstances under which the contract was entered into and, above all, the contract itself if it is in writing must be proved and produced. In the present case, though it has been held to be a right implicit in the Kabuliya, I do not gather that the Kabuliya of the complainant or of any body else has been so much as put in evidence. How it can be a natural right and at the same time a matter to be implied in the contract I do not quite understand, but it is evident to me that a very serious question of civil law has been dealt with in these criminal Courts in a somewhat cavalier manner and in almost complete absence of the necessary materials which would enable a lawyer to give an answer to the questions which are raised. In my judgment, a case of this sort can only succeed where the right infringed is reasonably clear and plain. If in a case

of this kind a complicated question of civil law has to be considered before it can be decided whether the tenants have any actual right to this water or not, then the Police Court is not only a very unsuitable place for the discussion of such right but the prosecution would probably fail upon the ground that the landlords might honestly have thought that they had the right which they claimed.

It appears to me that it is not possible to let this conviction stand and the proper course for these tenants, if they desire to assert a right to have the water in these Khals kept in such a way as they can use it, is to take proceedings for an injunction in a Civil Court or to take measures by which the rights of the parties can effectively be ascertained.

In my judgment, the Rule must be made absolute, the conviction and the sentences must be set aside, the accused acquitted and the fines, if paid, must be refunded.

Patterson, J.: I agree.

A. T. M.

*Rule made absolute: Accused acquitted.*

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Ashutosh Ghose

King-Emperor.

*Rankin, C. J.*

## APPELLATE CRIMINAL

*Before Mr. Justice M. N. Mukerji and Mr. Justice Jash.*

PRAFULLA KUMAR BOSE

vs.

KING-EMPEROR.\*

CRIMINAL.

1929.

August, 26, 28.  
September, 3.

*Kidnapping—Indian Penal Code (Act XLV of 1860), Sec. 366—'Forced or seduced'—One charge of kidnapping and abduction—Accused reticent—Inquisitorial proceedings—Evidence Act (I of 1872), Secs. 65, 66—Contents of a letter—Notice to produce not given—Sufficiency of search.*

The word 'forced' in section 366 of the Indian Penal Code ("in order that she may be forced or seduced") is used in its ordinary sense, which includes forced by stress of circumstances.

\* Criminal Appeal No. 216 of 1929, against the order of N. G. A. Edgley Esq., Sessions Judge of Sylhet, dated the 8th February, 1929.

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1929.

Profulla Kumar Bose

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The word 'seduced' in section 366 of the Indian Penal Code ("in order that she may be forced or seduced"), though sometimes used to mean to induce a girl to part with her virtue for the first act of seduction, also means subsequent seduction for further acts of illicit intercourse: *Rex v. Moon* (1).

If the girl is 16 or over, she can only be abducted and not kidnapped, but if she is under 16 she can be kidnapped as well as abducted if the taking is by force or the taking or enticing is by deceitful means.

A charge setting out charges of kidnapping and abduction under section 366 of the Indian Penal Code, is not bad.

If an accused prefers to be reticent, the Court should not hold an inquisitorial proceeding.

The fact that the accused declines to make a statement will not necessarily indicate to the Judge that the accused cannot like to answer specific questions put to him.

Where oral evidence was given to prove the contents of a letter, which was neither produced nor called for, and no objection was raised to the giving of evidence, the secondary evidence was inadmissible under section 66 of the Evidence Act and the subsequent dispensing with of the notice would not make the evidence admissible that was inadmissible at the time it was given: *Kameshwar Pershad v. Amannulla* (2). In this case, it was held to be a technical defect of procedure as also it was not a case under section 65 Cl. (a) but under Cl. (c) of that section. It was therefore only a question of sufficiency of the search that should have been made for justifying the reception of secondary evidence: *Harripria Devi v. Rukmini* (3).

Appeal under section 410 of the Code of Criminal Procedure by the Accused.

The material facts appear from the judgment.

*Messrs. Narendra Kumar Bose and Hari Charan Banerji* for the Accused.

*Mr. Birbhusan Dutt* for the Crown.

C. A. V.

The judgment of the Court was as follows:

The appellant Profulla Kumar Bose has been convicted by the Sessions Judge of Sylhet under section 366 Indian Penal Code and has been sentenced to undergo rigorous imprisonment for 18 months and to pay a fine of Rs. 1200, or in default to undergo rigorous imprisonment for 18 months more. The fine has been ordered to be paid as compensation to the father of the girl in respect of whom the offence has been found to have been committed. The trial was held with the aid of a jury on charges under

(1) [1910] 1 K. B. 818.

(2) (1898) 1 L. R. 26 Calc. 53.

(3) (1892) 1 L. R. 19 Calc. 438; 1 L. R. 19 I. A. 78.

sections 366, 368 and 376 Indian Penal Code. The jury were unanimous in their verdict. They found the appellant not guilty under section 376 Indian Penal Code. They held that he was guilty under section 366 Indian Penal Code, finding that the girl had been kidnapped, the seduction having taken place before the girl left her father's place. They held that in the circumstances the offence under section 368 Indian Penal Code did not arise.

The story needs no recounting. It is set out in all its harrowing details in the voluminous charge which the learned Judge delivered and which purports to deal with every point in controversy with all the evidence bearing on it and from all conceivable view-points. Put in a nutshell, the story is that the appellant who was an Assistant Surgeon at Sunamgunge in the District of Sylhet, taking advantage of his position as the next door neighbour, and abusing the confidence that was reposed on him as the medical attendant of the girl who was placed under his treatment and which enabled him to have almost free access into the house wherein the girl lived, kidnapped or abducted the girl on or about the 20th August, 1920, and removed her from place to place keeping her concealed to avoid detection till the girl was recovered at a place called Khalsini, near Chandannagore on the 23rd March, 1923. The story is that in the meantime the girl gave birth to a child, which however died. Information of the girl having left her father's house was given to the police almost simultaneously with her disappearance. The appellant remained at Sunamgunge till April, 1921, presumably to keep up appearances. Subsequently, sometime in 1922, the father on receipt of some information against the appellant applied for and obtained warrant for his arrest and search warrant for the production of the girl. After the girl was recovered on the 23rd March, 1923, as already stated, the usual investigation by the Police followed, and a charge sheet was submitted against the appellant on the 10th June 1921. The appellant, however, could not be arrested then. He eventually surrendered on the 21st December, 1927.

In this appeal which the appellant has filed to this Court from his conviction and sentence, various grounds have been taken which we propose to deal with one by one.

It has been urged in the first place that the learned Judge has not correctly explained the offence punishable under section 366 Indian Penal Code. It has been argued that the expression "in order that he may be forced or seduced to illicit intercourse" has been wrongfully explained. The contention is that the learned

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Judge wrongly explained the two words 'forced' and 'seduced.' As regards the word 'forced' the learned Judge said as follows:—

"Force implies not merely physical force but also the force of circumstances. For instance, a girl who has been kidnapped from her father's house may be placed in such circumstances that she has no option but to submit to illicit intercourse. For instance, if she was entirely in the power of her kidnappers or abductors, her consent might be nothing more than a mere submission to their will."

It is contended that this explanation of the word 'forced' goes far beyond the definition given in section 349 Indian Penal Code. This argument overlooks that the definition that is given is not the meaning of the verb 'force' but of the expression 'to use force.' In our opinion there is no reason to suppose that the word 'forced' as used in section 366 Indian Penal Code was not used in its ordinary dictionary sense, which would include forced by stress of circumstances. Assuming however that the learned Judge was not right in the meaning he gave to the word, the error, even if there was any, did not matter, because the learned Judge made it plain to the jury that the question they had to consider was "whether or not the doctor's main motive in kidnapping or abducting the girl was that she should be seduced to illicit intercourse with himself." It is 'seduction' that the jury had to deal with and not 'force,' and the verdict shows that the jury rightly understood the point. As regards the word 'seduced' the learned Judge told the jury by reference to some decided cases that though the word 'seduction' is sometimes used to mean to induce a girl to part with her virtue for the first time, the word as used in the section should not be taken to have that narrow meaning, but that even though a girl may have by the first act of seduction surrendered her chastity, subsequent seduction for further acts of illicit intercourse was also meant to be included. It has been urged that this view is wrong and as authority in support of this contention *Rex v. Moon* (1) has been cited, though that case, amongst others, has been relied upon by the learned Judge and in support of the view he took. We are of opinion that the view taken by the learned Judge is correct. It is the view taken in several reported decisions on the section, and is amply supported by what Channel J. as well as the Court of Appeal say in the case of *Rex v. Moon* (1) as regards the meaning of the word. The Court of Appeal in that case only held that the wider meaning should not be given to the word 'seduction' as used

(1) [1910] 1 K. B. 818.



in the particular section of the Childrens' Act, in view of the words 'or prostitution' that stood next to it.

The second ground urged is that the learned Judge mixed up the two offences of kidnapping and abduction and did not keep the elements of those offences separate before the jury. As indicating this confusion, reliance has been placed upon the following passage in the summing up :

"I should also be glad if you would come to a further finding of fact whether you think that the girl had been kidnapped or abducted or kidnapped and abducted."

This contention in our opinion has no substance inasmuch as one of the questions in dispute in the case was that relating to the age of the girl. If the girl was sixteen or over, she could only be abducted and not kidnapped, but if she was under sixteen she could be kidnapped as well as abducted if the taking was by force or the taking or enticing was by deceitful means.

Thirdly it has been contended that the charge under section 366 Indian Penal Code should have been split up into two, one relating to kidnapping and the other to abduction, and it has been said on the authority of the case of *Isa Sheikh v. King-Emperor* (1), that it was illegal to frame one count of charge setting out both the offences in the alternative. We are not prepared to say that a charge of latter character contravenes the requirements of the law, far less that there was the least prejudice caused to the appellant thereby.

The next ground of objection relates to the admission of oral evidence from the girl as regards certain letters which she said she had received from the accused and which she returned either to a man of the accused named Ram Charan, or to the accused himself. This ground has been pressed with considerable force. What happened was that no exception was taken to the reception of this evidence when it was given but several days after the deposition was over, an application was made objecting to it on the ground that the notice contemplated by section 66 of the Evidence Act had not been given. The learned Judge then passed an order that as the accused denied having got the letters in his possession this was a case in which he would dispense with the notice. It has been urged that the fact that objection was not made at the time did not matter and that the subsequent dispensing with of the notice would not make the evidence admissible that was inadmissible at the time it was given. The first of these propo-

(1) (1926) 31 C. W. N. 171.

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sitions need not be disputed : *Kameshwar Pershad v. Amanstulla* (1) and the second one is obviously just. But there are several answers to the appellant's contention. One is that the learned Judge might have expunged the evidence that had already been given and after dispensing with the notice, allowed the same evidence to be given over again ; this technical defect of procedure that there was in not adopting this course can well be condoned. Another is that the case can hardly be regarded as one in which the originals are "shown or appear to be in the possession or power" of the accused,—it not having been stated by the girl that that was so, and it not having been the case of the accused that he had the letters. It was therefore not a case under section 65 Cl. (a) but rather under Cl. (c) of that section. If so, it was only a question of sufficiency of the search that should have been made for justifying the reception of secondary evidence. In such a case, as the Judicial Committee has pointed out, "whether or not there was evidence of such an amount of search for the originals as would justify the Court in admitting secondary evidence of it was a point which was proper to be decided by the Judge of first instance, and was to be treated as one depending very much on his discretion, and the conclusion should not be overruled except in a very clear case of miscarriage of justice" : *Haripriya Devi v. Rukmini* (2). Apart this ground it has been also urged that sufficient directions were not given by the learned Judge to point out to the Jury the improbability of the girl remembering the contents of the letters for such a length of time, but we do not think that there is anything in this objection.

The fifth ground is a complaint against the procedure adopted by the learned Judge in interposing two frequently in the midst of the examination and the cross-examination of the girl by putting questions to her. He have examined the evidence that was elicited in that way, and we think that the only object of the learned Judge was to clear up matters involved in obscurity, and that except as regards one or two points, what was said in answer to the question put as aforesaid, was in favour of the accused. Of course if the learned Judge hampered the prosecution or the defence by taking the case out of their hands that would be a different matter ; but no complaint of that character was made at the time, and there is nothing on which such a complaint can reasonably be made now.

(1) (1898) I. L. R. 25 Calc. 53.

(2) (1892) I. L. R. 19 Calc. 438 ; I. L. R. 19 I. A. 178.

The sixth ground is to the effect that the learned Judge did not give sufficient or proper directions as regards the non-examination of witnesses. What he did was to tell the Jury,—

“It has also been pointed out that a number of persons whose names transpired in the evidence, have not been examined as witnesses and during the course of the arguments the learned defence pleader produced a list of 26 persons who are according to his contention should have been examined by the prosecution.”

Having said this the learned Judge proceeded to deal specially with one of this witnesses, namely the husband of the girl. Then he said generally—

“If such witnesses are not produced and examined, you may draw an inference that their testimony would not have supported the prosecution case.”

He then briefly discussed the information on the record regarding the said 26 witnesses in order to explain to the jury to what extent the said witnesses could have given material evidence, and placed the whole list before the jury in that way.

We do not think there was anything left unsaid that should have been said on the question of non-examination of material witnesses. Amongst these witnesses were the astrologer and the mother, for whose non-examination a good deal of argument has been advanced before us. Hemangini also is mentioned in that list.

It has been contended as the seventh and eighth grounds that the learned Judge should have told the jury that if the charge of rape failed the evidence of the girl and of the other witnesses should be regarded as very much discredited. The ninth ground is to the effect that on the question of omission on the part of the girl to state before the Committing Magistrate matters that she spoke to in the Court of Sessions the Judge's remarks had the effect of minimizing the importance of the omission. We do not feel pressed by any of these grounds.

The tenth and last ground is a complaint as regards the examination made of the appellant by the learned Judge. The contention is that after the appellant had declined to make a statement the learned Judge should not have put questions to him in the way that he did. Objection is also taken to the form of the questions their range and their number and it is also said that the questions were of an incriminating character and were in the nature of cross-examination. Now the first question that the learned Judge put and the answer that the appellant gave to it were as follows :—

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"Q. Do you wish to make a statement? You are not bound to do so but if you do so your answers may be taken into consideration at the trial and put in evidence for or against you.

"A. I am not guilty. I do not wish to make any statement. What I have got to say my lawyers will say in the argument."

After this the learned Judge put to the appellant a very large number of questions covering almost every single point which formed the main allegations in the case for the prosecution. It is true that if an accused prefers to be reticent the Court should not hold an inquisitorial proceeding, but what was done in this case was something entirely different. The fact that the appellant declined to make a statement would not necessarily indicate to the Judge that the appellant would not like to answer specific questions put to him. The appellant did answer all the questions without demur. The questions were not inquisitorial or of a cross-examining character, and were not intended to fill up the gaps, if any, in the prosecution case. They were clearly put with the object of knowing what portion, if any, of the prosecution case was also the case for the defence, so that the learned Judge might be better able to place the case properly before the Jury. They were also put to give the appellant a proper opportunity of explaining, if he would, the circumstances appearing against him in the evidence. No advantage has been taken of any slips that the appellant may have made in his answers. The questions may have been somewhat inconvenient for the appellant, but there is nothing therein of which he can legitimately complain.

We are unable to hold in appellant's favour upon any of the ten points on which the appeal has been pressed.

The appeal is accordingly dismissed.

A. T. M.

*Appeal dismissed.*

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| The written statement should show that there has been a repudiation of the tenancy prior to the institution of the suit.                                                                                                                                                                                                                     |     |
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| It is not obligatory on the Magistrate to grant an adjournment on receipt of an application intimating him that an application will be made for transfer under section 526 of the Code of Criminal Procedure and asking him to adjourn the case for that purpose and the rejection of the application is not in violation of the provision of the law. |       |
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**Admissibility—(Contd.).**

*Sec. 33—Opportunity to cross-examine—Criminal Procedure Code (Act V of 1898), Secs. 208(2), 288—Deposition of witness put in in the Sessions Court.*

The method of proving a dying declaration, and the method as usually adopted, is to examine the person who recorded the statement as to what the deceased said, or to examine some person or persons who were present at the time and heard the statement being made.

The Sub-Inspector of Police who took the dying declaration was examined in the Committing Court, but he died before the Sessions trial. The prosecution sought to put in the deposition of the Sub-Inspector under section 33 of the Evidence Act. The Sessions Judge held that it could not be admitted in evidence on the ground that no specific opportunity had been given to cross-examine the witness. While however disallowing the prayer to put in the deposition, he directed that portion of the statement itself as recorded by the Sub-Inspector, in which the names of the deceased's assailants were mentioned, might go in on the ground that some of the witnesses had deposed to those statements as having been made by the deceased in their presence to the Sub-Inspector :

*Held*, that the dying declaration could not as such be admitted in evidence.

That the Judge erred in admitting portions of the statement in evidence.

That the deposition of the Police Sub-Inspector was admissible under section 33 of the Evidence Act, as there was opportunity to cross-examine the Sub-Inspector, if the accused had chosen to exercise their right under section 208(2) of the Code of Criminal Procedure.

Deposition of a witness [put in by the defence under section 288 of the Code of Criminal Procedure was evidence in the Sessions Court and it was open to the jury to believe that evidence if they so wished. *Tafiz*

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The terms of Order 11 rule 21 contemplate two orders being made. First an order for the answer to the interrogatories or for the delivery or inspection of documents as the case may be within a specified time ; and secondly upon the failure to comply with such an order a further order dismissing the suit. An order dismissing the suit should not be made unless the Court is satisfied that the plaintiff is endeavouring to avoid giving a fair and proper discovery.

An order was made on the 14th February 1923 ordering the plaintiff to file a further and better affidavit within 10 days from the date and in default the suit would stand dismissed. This order was not complied with but the plaintiff filed his affidavit on the 13th March, 1923. The defendant applied to the Court on the 14th May, 1923 for an order that the further and better affidavit of documents improperly filed on the 13th March, 1923 be taken off the file and that the suit be struck off. On the 14th May, 1923, the Court passed the order : "It is ordered that the further and better affidavit of documents filed by the plaintiff firm after the expiration of the time granted by the said order be taken off the file ; and it is further ordered that this suit be and the same is hereby dismissed for want of prosecution." Against this last mentioned order, the plaintiff appealed on the 4th June, 1923 :

*Held*, that the order of the 14th February, 1923, became, on the 25th February, a final order dismissing the suit. It was open to the plaintiff to appeal from that order or to make an application upon proper materials to review the judgment by way of extending the time for the filing of the affidavit.

The appeal which was filed on the 4th June and was limited to the order of the 14th May, so far as the order of the 14th February was concerned,

**Appeal—(Contd.)**

was out of time even if it could be considered as an appeal against the order of the 14th February.

In order that the provision of section 5 of the Limitation Act be available it would have been necessary for the plaintiff to show that he had sufficient cause for not preferring the appeal within the time specified.

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—, *if competent*—*Appeal against preliminary decree—Final decree passed before the filing of appeal—Preliminary and final decrees, nature of—Execution Court, if can enquire whether the final decree ceased to have any effect.*

When a preliminary decree is set aside, the final decree is superseded whether the appeal was brought before or after the passing of the final decree and an appellate Court when setting aside or varying a preliminary decree can, and indeed should, give directions for the setting aside or varying of the final decree if the existence of the final decree is brought to its notice.

It is not necessary for a party aggrieved by a preliminary decree to appeal both from that decree and the final decree in order to maintain his appeal against the preliminary decree.

A preliminary decree is not a mere interlocutory order whose force is spent when the suit is disposed of.

A final decree is, in its nature, dependent and subordinate. The function of the final decree is merely to re-state and apply with precision what the preliminary decree has ordered.

The mere fact of a final decree is not evidence of conduct or even of laches, which prevented a party from exercising any right of appeal therefrom conferred upon by law.

A Court of execution is entitled to enquire whether the final decree originally passed is still subsisting or has ceased to have effect. **Taleball v.**

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| According to agreement though a decision arrived by the majority of the arbitrators would be a good one, the arbitrator, who did not join in the award prepared by the majority must act in the matter of arbitration. In the present case the provision as regards the arbitrators acting together may be construed as a provision for the event of all the arbitrators not acting in the matter of arbitration. |       |
| If an award is incomplete, the parties may affirm and may agree that that incomplete award would be binding upon them.                                                                                                                                                                                                                                                                                            |       |
| Even if the parties had appointed quite a different set of arbitrators agreeing to abide by the previous award and asking them to complete the work done by the previous arbitrators, the previous award should be considered as affirmed by the parties and they would not be allowed to attack the award on the ground that it was incomplete.                                                                  |       |
| Having acted in accordance with the award, a party cannot turn round and say that the award is invalid, unless he can prove that he was acting under some misapprehension.                                                                                                                                                                                                                                        |       |
| No person can affirm in part an award and then repudiate in part. He must either accept the whole or repudiate the whole.                                                                                                                                                                                                                                                                                         |       |
| If there had been any illegality in the award, that can be waived by the conduct of a party. <i>Ananta Lal Pakraol v. Jnanada Sundari Dehya</i>                                                                                                                                                                                                                                                                   | 323   |
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| <b>Benami transactions</b> — <i>Civil Procedure Code (Act V of 1908), Sec. 66—Transferees from certified auction-purchaser—Transactions completed during currency of section 317 of the old Civil Procedure Code (Act XIV of 1882), whether affected by the new Code—Alternative cause of action based on possessory title acquired by the beneficial owner by 12 years' adverse possession.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |       |
| The effect of section 66 of the Civil Procedure Code, 1908, is not to make benami transactions illegal, but only to prohibit for reasons of public policy a suit against the certified purchaser on the grounds specified in the section :                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |       |
| <i>Quare</i> , whether the provisions of section 66 of the present Code of Civil Procedure, prohibiting a suit against transferees from a certified purchaser, are applicable to a suit instituted after the commencement of the Code of 1908 against transferees from benamidars made when the corresponding section 317 of the Code of 1882 was in force.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |       |
| While section 66, Civil Procedure Code, 1908, protects the certified purchaser, so long as he retains the possession given him by the Court, from a suit by the true owner, if he (the certified purchaser) allows the real purchaser "being the true owner" to get possession, the section does not enable him to sue for possession, because possession has come into the hands of the true owner, who is entitled to it. In other words, where the certified purchaser sues as a plaintiff, it is open to the defendant, the real owner, if in possession, and if that possession has been honestly obtained, to defeat the suit by showing the real nature of the transaction.                                                                                                                                                                                                                                                                                                  |       |
| <i>A fortiori</i> , if the real purchaser, after having been allowed to remain in adverse possession for more than 12 years, is subsequently dispossessed by the certified purchaser, he is not precluded by section 66 from suing for recovery of possession on the strength of the title so acquired under the Limitation Act. It being unnecessary for him, in such a suit, to aver or prove as part of his cause of action that the auction purchase was made on his behalf, he cannot be regarded as suing "on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims" within the meaning of section 66 ; and the mere fact that the plaintiff as part of an alternative cause of action sets up and proves that the auction purchase was, in fact, benami does not render the provisions of section 66 applicable. <b>Kunwar Muhammad Abdul Jalil Khan v. Khan Bahadur Muhammad Obaid Ullah Khan</b> ... | 358   |
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| <b>Burmese Buddhist Law</b> — <i>Inheritance</i> — <i>Devolution of property of owner leaving widow and son</i> .                                                                                                                                                                          |     |
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The English Law as comprised in the maxim, "*quicquid plantatur solo, solo cedit*", has no application in India.

There is no absolute rule of law in India that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself.

Buildings erected on the land of another do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil. If he who builds on another's land is not a mere trespasser, but is in possession under any *bona fide* title or claim or colour of title, he is entitled either to remove the materials, or to obtain compensation for the value of the building, at the option of the owner of the land.

Where Government entered into possession before the land was actually notified for acquisition under the Land Acquisition Act, 1894 :

*Held*, that the justice of the case was amply met by awarding to the owner of the land (as compensation for such occupation) interest on the value of the land computed from the date when the Government so took possession.

Where the question as to the proper amount to be awarded as compensation for land acquired under the Land Acquisition Act is one of mere valuation

**Compensation—(Contd.)**

ation and no question of principle is involved, the Privy Council will, in accordance with their usual practice, decline to interfere with the decision of the Court of Appeal in India. **Vallabhdas Naranji, Khot of Kanjur v. The Development Officer, Bandara** ... ..

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**Compound interest—Agreement to pay—Course of dealings between parties.**

Compound interest, or interest with annual rests, may be allowed where the course of dealings between the parties extending over a large number of years shows an agreement by the debtor to pay the compound interest which was in fact charged by the creditor in the accounts periodically submitted to and acquiesced in by the debtor. **Hiralal Saha v. Rajkumar Babu Lachmi Prasad Narain Singh** ... ..

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**Concurrent findings of fact—Practice of the Privy Council.**

According to the well-established practice of the Privy Council, concurrent findings of fact by the Courts below will not, ordinarily, be reviewed by their Lordships' Board, when there is evidence upon which those findings could have been reached. **Sheth Mafatlal Jagajibhai v. Sheth Jivanlal Girdhardas** ... ..

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| In a suit for partnership accounts, valued at Rs. 3000 for the purposes of court-fee, the plaintiffs asked for a rendering of accounts and a decree for Rs. 3000 with the statement that "if more than Rs. 3000 be found due to the plaintiffs they will pay an additional court-fee." The Trial Court by its final decree declared that Rs. 19,991, were due to the defendants, by the plaintiffs. No sum was found due to the plaintiffs under their claim for Rs. 3000. The plaintiffs appealed against the decree, praying for a reversal of the decree against them and for granting a decree in their favour for such amount as may be found due. They valued the appeal, for purposes of court-fees, at Rs. 19,991, and paid a court-fee of Rs. 975 due thereon : |       |
| Held, that the memorandum of appeal complied with the requirements of the Court-Fees Act, 1870, section 7, sub sec. (4), in stating the amount at which the relief sought was valued.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |       |
| Held, further, that the payment of Rs. 975 as court-fee sufficiently covered the appeal as a whole, including Rs. 19,991 (the amount of the decree passed against the appellants) on the one hand and a much smaller figure of Rs. 3000 (being the amount of the appellant's own claim) on the other. The plaintiffs' appeal was accordingly correctly stamped so as to cover all the relief sought, including their prayer that a decree for Rs. 3000 or less or more should be granted in their favour.                                                                                                                                                                                                                                                                |       |
| Assuming that the court-fee paid on the memorandum of appeal was inadequate, this was pre-eminently a case for the exercise of the Court's discretion under section 149, Civil Procedure Code, 1908.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |       |
| Where the court-fee paid on a memorandum of appeal is insufficient in amount, the Court may in the exercise of its discretion under section 149 Civil Procedure Code, 1908, give an opportunity to the appellant to add to the amount already lodged the extra sum required to make up the deficiency. The discretion conferred on a Court by this section extends to the whole or any part of any fee prescribed and can be exercised at any stage in the case, and, upon the extra payment being made, the                                                                                                                                                                                                                                                             |       |

**Cour -fee—(Contd.).**

document is to have the same effect as if it had been paid in the first instance.

A memorandum of appeal duly presented within time and accepted by the Court is not a nullity merely because an inadequate court-fee has in the first instance been paid thereon. Upon payment of the deficient fee, the memorandum of appeal stands good from its date, and the appeal is not time-barred, (vide the concluding words of section 149 of the Civil Procedure Code). *Faizullah Khan v. Muladad Khan* ...

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| Where a person sends perishable goods in Railway consignments under Risk Note Form H and these goods are damaged:                                                                                                                                                                                                                                                                          |     |
| <i>Held</i> , that the Railway Company is not liable for such damage under that Risk Note Form H which makes the Railway Company liable only in case of loss of the goods consigned.                                                                                                                                                                                                       |     |
| The term "loss" in the Risk Note Form 'H' means loss of a complete consignment or one or more complete packages. It does not mean destruction or deterioration of or damage to the goods consigned. The Railway Company could not be liable merely because there was a pecuniary loss to the owner of goods. <i>Hazi Tilloin Mohammed Umar Buksh v. The Bengal Nagpur Railway Co. Ltd.</i> | 24  |
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One Ramchand Mukherjee died in 1862 leaving a Will by which he left a legacy of Rs. 30,000 to an Idol, and provided that his sons would act as shebait for their lifetime and after their death his grandsons will get absolutely the shares of their respective fathers. Ramchand left 3 sons, Panchanan, Ramlal and Soshibhusan. There was litigation between the 3 brothers as the result whereof Ramlal's interest in the properties was purchased by Panchanan in 1879. Subsequently in 1881 there was an agreement between Panchanan and Soshibhusan to give over certain properties to the Idol in satisfaction of the legacy. Panchanan died sonless. From 1881 till the date of suit Ramlal or his branch did not take any part in the Sheba. Soshibhusan exclusively performed the worship and managed the debutter properties. In 1897 Soshibhusan removed the Thakur from the temple to his own dwelling house. In 1911 Soshibhusan died leaving a Will by which he nominated one Ramsevak Mukherjee his grandson by a predeceased son to be the shebait. Ramsevak acted as shebait from 1911 till 1923 when he died leaving a widow Mayabati Dobi and a Will by which he nominated his sister's son Panchanan the plaintiff to be the next shebait. After Ramsevak's death, there were testamentary proceedings in the course of which Mayabati Dobi withdrew her caveat and received the sum of Rs. 20,000 in satisfaction of her right of residence and maintenance and all other claims including claim to the Debutter estate.

In a suit by Ramsevak's nominee Panchanan Banerjee against the heirs of Panchanan and Ramlal and Ramsevak's widow Mayabati for a declaration that he was the sole shebait and that the defendants were not the lawful shebait of the Idol:

Held, the plaintiff could not succeed in his suit, as he was a mere stranger to the shebaitship and the dedicated properties.

In order to be entitled to succeed to hereditary shebaitship, it is not necessary to show that the claimant is one of the heirs of the founder himself. It is enough if he can make out that he is the heir of the last shebait.

The rights of the parties in this suit were to be governed by R. Chand's Will, although the Debutter properties were dedicated by his sons.

The plaintiff claimed to be entitled to the shebaitship as against Mayabati,

(a) on the ground of Mayabati's surrender of her claim to the shebaitship

**Declaratory Suit—(Contd.)**

and thereby effacing herself in favour of the plaintiff who was the next in succession.

(b) On the ground that Mayabati as the then representative of the Debutter estate could renounce her shebaitship by a *bona fide* compromise not contrary to the interest of the Idol and she was bound by the terms of settlement in the testamentary suit.

*Held*, that the arrangement by which Mayabati purported to give up her right to the shebaitship in favour of the plaintiff was a bad bargain and could not be supported upon the principles applicable to the subject.

A Shebait is incompetent to sell his religious office for his own pecuniary benefit, even if he sells to the person next in succession to the office.

*Per Rankin, C. J.* : The transaction in question is in no way analogous to a valid surrender by a Hindu widow of her whole interest in the husband's estate. It is an attempt on the part of a person who has succeeded to the office of shebaitship to sell her right for her own pecuniary advantage.

*Per Rankin, C. J.* : A person cannot be compelled to accept the office of shebait and may be entitled to refuse to continue in it. It may well be that in such a case, the office goes to the person next in succession. But a sale of the office is a different thing and the purchaser cannot enforce it.

*Held further*, that the transaction could not be upheld on the ground of a *bona fide* compromise of her rights under the Will because there was no question which could fall for compromise in probate suit and which had any reference to the Diety. Whether the Will was a good Will or a bad Will the claim to represent the Diety stood untouched.

As against Ramlal's branch the plaintiff based his claim on adverse possession of the office of shebaitship by Soshibhushan and Ramsevak and by him as Ramsevak's nominee under the Will :

*Held*, the plaintiff was a mere stranger and he could not tack the possession of Soshibhushan and Ramsevak so as to get any right to the shebaitship of the Diety.

*Per Rankin C. J.* : The case is governed by Article 124 of the first schedule of the Limitation Act. What has to be shown is that if Ramsevak's representative or Panchanan's representative had brought a suit in 1927 (the date of the institution of this suit) they would have been barred from asserting their rights to be shebait. If this is made out then under section 28 of the Limitation Act their rights would come to an end.

*Held*, on the evidence that the plaintiff had failed to discharge the heavy burden of proving that the possession of Soshibhushan or of Ramsevak was adverse to the other branches or that it amounted to ouster.

*Per Rankin, C. J.* : In the case of co-ownership the possession of one co-owner is possession of them all. In order that it may be treated as an adverse possession there must be ouster or the equivalent to an ouster. It is familiar law in this Court that when one party out of several has in

**Declaratory suit—(Contd.).**

fact the enjoyment of the property the circumstances may be such and the exclusive enjoyment may be for so long a period as to be some evidence that his holding is adverse to the co-owners though the view taken in this Court is that the possession is not necessarily or usually deemed to be adverse from its commencement. This is a question of fact.

**Panchanan Banerjee v. Surendra Nath Mukherjee** ... 382

**Decree, execution of—Receiver, appointment of—Civil Procedure Code (Act V of 1908), Sec. 51—Decree against Nawab of Murshidabad.**

In execution of a decree against Nawab of Murshidabad, a Receiver can be appointed of rents and profits issuing out of his immovable properties; Act XV of 1891 is no bar. The appointment of such Receiver is discretionary with the Court. **Karnani Industrial Bank Ltd. v The Nawab Bahadoor of Murshidabad** ... 403

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**Defendant, duty of—Defendant misled by ambiguous plaint; see Plaint** ... 509

**Delegation to act for Mohunt in his duties during his absence; see Mohunt.** ... 513

**Demolition of structure—Calcutta Municipal Act (III B. C. of 1923), Sec. 363—Structure, when made—Disbelieving owner's evidence—Calcutta Municipal Act as amended by Act (V B. C. of 1926), Sec. 557 A Cl. (4)—Time limit.**

In a proceeding for demolition of a structure it was contended that under Sub-section (a) of section 363 of the Calcutta Municipal Act that the question before the Magistrate was not whether the Corporation had shown the date of the work being done or that the date was within 5 years of the institution of the proceedings but whether the owner had established to his satisfaction that the work had been done more than 5 years previously:

*Held*, that the Magistrate was justified in refusing to be satisfied with the evidence of the owner to the effect that the work was done more than 5 years from the date of the proceeding; that from the materials before him, the Magistrate was entirely justified in finding that the structure in question was newly made within the period of 5 years prescribed by Sub-section (a) of section 363.

The occupier of the premises was made a party to the Magistrate's proceedings on the 17th January, 1928. It was contended that under the Amend-

**Demolition of structure—(Contd.).**

ing Act V B. C. of 1926, Cl (4) of section 557A of the Calcutta Municipal Act, a limitation of one year was put from the date of the commencement of the Act to the time within which proceedings might be taken against the party :

*Held*, that unless the occupier showed that the structure was erected before the 17th January, 1923, he was not protected by any time limit imposed by the Act.

Clause (4) of section 557A of the Calcutta Municipal Act does not mean that no legal proceeding under section 557A is ever to be taken after the expiry of one year from August, 1926. What it says is that if under the Act or any other law, a lawful proceeding between August, 1926, and August, 1927, would have been barred, it is not to be barred until August 1927.

The effect of Cl (4) of section 557A of the Calcutta Municipal Act is that between August, 1926, and August, 1927, even although 5 years had expired, a legal proceeding would have been competent because the clause is intended as an extension of limit in view of the fact that legal proceedings were not possible effectively for some considerable period prior to the Amending Act. **Ram Gopal Gosnka v. The Corporation of Calcutta** ... ..

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**Deposit—Agent—Maraldar—Funders and responsibilities—Firm responsible to the person beneficially interested in the fund, if have authority to change its investment and give a valid discharge for its repayment—Discharge of liability.**

A was a sonless widow whose husband R had died 2 years previously. In order to provide for a future adoption by A a sum of Rs. 5000, made up partly from her *stridhan* and partly by contributions from her own father V, and her father-in-law, was handed over to V to be deposited by him with a certain Chetti firm in Rangoon. The deposit was duly made with the agreed firm, but in 1892 the fund was transferred to V's firm (which is known by the initials A. M. V. R.) to another Rangoon firm known as V. E. A., whose representatives (defendants Nos. 7 to 11) were the respondents in the appeal, defendants Nos. 1 to 6 being the representatives of V's firm. There was no evidence on the record to show under what circumstances this transfer was made. It was not done at A's instance or after consultation with her.

The V. E. A. firm received the fund which then amounted to over Rs. 10,000, and credited it in their books under the heading "R. M. A. R. R. M." (which denoted the firm of A's deceased husband R.) "*maral* A. M. V. R." i. e. as received through V's firm (A. M. V. R.).

In 1895 the appellant, then a minor, was adopted by A, and a sum of Rs. 6680 was withdrawn from the fund for the expenses of the adoption. Shortly afterwards a sum of Rs. 900, representing presents made to the adopted boy, was added to the deposit in the hands of the V. E. A. firm. This withdrawal and further deposit were made by A. M. V. R. Interest was duly credited on the deposits by the V. E. A. firm, and

**Deposit—(Contd.).**

accounts were rendered annually to the A. M. V. R. firm, and this continued till 1904, when the A. M. V. R. firm, having opened a branch of their own in Rangoon, the balance of the fund was at their request paid over to them by the V. E. A. firm and the V. E. A. deposit account was finally closed.

During the whole of this period there was no communication of any sort between R's firm or A and the V. E. A. firm and no reference was made to either of them or to the appellant, who was then of full age, when the V. E. A. account was closed. Between 1904 and 1917, when the suit was filed, the appellant and his mother made numerous withdrawals, amounting in all to Rs. 8700, from the A. M. V. R. firm. V, the head of the firm, was the appellant's grand-father, and he survived till 1914 : *Held*, that *maraldar* was something more than a bare agent, the limit of his powers and responsibilities depending upon the understanding between the parties. It was a question to be decided upon all the circumstances of the case whether the intention was that V and his firm, while remaining directly responsible to those to whom the beneficial interest in the fund belonged, should have authority to change its investment from time to time and to give a valid discharge for its repayment ; and having regard to the relationship of the parties, the course of dealing between them, and the other facts of the case, the only possible inference was that V and his firm were alone responsible to the appellant and his mother, and that the repayment in 1904 by the respondent's firm to V's firm, with whom alone they had dealt, was a good discharge of their liability. *R. M. A. R. R. M. Aruna Chalam Chetti v. V. E. A. Vaylavvan Chetti* ... ..

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— *Bengal Tenancy Act (VIII of 1885), Sec 174—Correct amount not deposited through act of Court—Remedy—Appeal—Order setting aside sale—Civil Procedure Code (Act V of 1908), Sec. 47.*

When the judgment-debtor deposits the money, if by some mistake a short deposit is made and that deposit is accepted by the Court Official as the correct amount and when the mistake is discovered the judgment-debtor pays in the full amount, the judgment-debtor has complied with the provisions of section 174 of the Bengal Tenancy Act, provided the judgment-debtor establishes that he is prejudiced by the act of the Court and the mistake is attributable to that act : The only thing that can be done in such a case is that at the most he should be made liable to pay interest for a few days that the mistake was not discovered and the money was not paid.

An order under section 174 of the Bengal Tenancy Act does not fall within section 47 of the Code of Civil Procedure.

No appeal lies against an order setting aside a sale under section 174 of the Bengal Tenancy Act. *Abdul Gofur Mulla v. Kalidhan Mondal*

552

— *Transfer of Property Act (IV of 1882), Secs. 52, 83—Suit to realize interest on mortgage money by sale—Interest pending suit not decreed by primary Court but awarded in appeal—Sale of equity of redemption*



**Deposit—(Contd.)**

*pending appeal—Purchase subject to result of appeal—Lis pendens—Government Revenue.*

On the 14th January, 1910, the mortgagees brought a suit against the mortgagors for recovery of interest up to June, 1909. They claimed interest *pendente lite* and interest up to realisation, and also prayed for sale of the mortgaged properties in default of the payment of the amount that might be decreed in their favour and claimed possession of the mortgaged premises. The primary Court passed a decree in their favour on the 23rd February, 1912, and ordered that in default of the payment of the decretal amount on or before the 22nd August, 1912, the property will be sold under O. 34 R. 4 of the Code of Civil Procedure, but it did not allow any interest pending suit. The mortgagees appealed against the decree and the appellate Court on the 29th January, 1914, varied that decree by allowing interest during the pendency of the suit to the extent of Rs. 2706-2 as. and allowed the costs of the appeal, which were fixed at Rs. 416-12 6p. The decree was therefore increased by Rs. 3122-14-6p.

While the appeal of the mortgagees was pending, the mortgagors on the 12th April and 22nd June, 1912, sold and conveyed their equity of redemption to the respondents.

On the 29th June, 1912, the purchasers tendered certain amount in the Court under section 83 of the Transfer of Property Act and the question in the case was whether the purchasers were bound to pay the amount decreed by the appellate Court on the 29th January, 1914 :

*Held*, that the purchasers were bound to deposit in their application under section 83 of the Transfer of Property Act, the excess amount decreed by the appellate Court. The purchasers had no higher rights than their vendors and the sale having been made during the active prosecution of the litigation between the mortgagees and the mortgagors, they were bound by the result of the litigation.

That the mortgagees by paying the Government revenue were entitled to add the same for the purpose of ascertaining their total dues under their mortgage. *Shib Chandra v. Lachmi Narain* ...

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**Deposition of witness** put in by defence under section 288 of the Code of Criminal Procedure, if evidence in Sessions Court ; *see* Admissibility in evidence ...

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**Devolution of property of owner leaving widow and son ; *see* Burmese Buddhist Law** ...

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**Discharge, valid—Change of investment—Firm responsible to the person beneficially interested in the fund ; *see* Deposit** ...

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**Dispute concerning land—Criminal Procedure Code (Act V of 1898), Secs. 144, 145—Magistrate, if can direct subordinate Magistrate to institute proceedings under section 145—Materials on which to base proceedings.**

The District Magistrate has no authority in law to direct a subordinate Magistrate to institute proceedings under section 145 of the Code of

**Dispute concerning land—(Contd.),**

Criminal Procedure. Whether such proceedings should or should not be taken is entirely a matter within the Magistrate's own discretion.

Where the District Magistrate in his judgment stated: "The Magistrate should include the whole of the disputed land...if such action is called for by the circumstances of the case":

*Held*, that the order was intended to leave the Magistrate free to exercise his own discretion in the matter.

That as the Magistrate in the present case had ample materials before him on which to base the amended proceedings, he acted within his jurisdiction in ordering proceeding to be converted into section 145 proceeding from section 144 proceeding. *Nripendra Chandra Sen v. Sasadhar Saha*

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**Document, admissibility of, when to be decided—Criminal case—Opening of prosecution; see Misdirection**

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—, material alteration in—Origin of the tenancy; see *Kabuliat*

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—, material alteration in—Suspension of rent—Additional rent for excess land—Presumption under section 50 of the Bengal Tenancy Act; see *Kabuliat*

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**Dower debt—Decree in dower suit creating a charge upon property; see**

*Muhammadan Law*

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— debt—Unsecured—*Bona fide* purchaser for value from the heir of deceased husband; see *Muhammadan Law*

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**Dying declaration, how proved; see Admissibility in evidence**

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— declaration, part of, if admissible in evidence—Dying declaration recorded by Sub-Inspector—Death of Sub-Inspector before trial in Sessions Court; see *Admissibility in evidence*

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— declaration recorded by Sub-Inspector—Death of Sub-Inspector before trial in Sessions Court—No cross-examination—Evidence Act, Sec. 33; see *Admissibility in evidence*

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**Ekatnamia between two Hindu sisters curtailing the *jus accrescendi*; see Will, construction of**

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**Enhancement of sentence—Application by complainant—Inadequacy of sentence; see Revision**

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— of sentence—Application by complainant—Accused convicted on his plea of guilty; see *Revision*

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**Entries in Khattians prepared for the purposes of settlement under Regulation VII of 1832—Title—Record of fact for calculation of revenue; see Settlement**

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**Equitable charge upon immovable property, if requires registration; see Registration**

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**Evidence—Evidence Act (I of 1872), Sec. 6—Statement of mother as to what her child said.**

The statement of the girl's mother as to what the girl said is not evidence of the fact that she was bitten by a leech. It could possibly be used to corroborate or to contradict the statement made by the girl. By itself it would not be a substantive evidence of the fact that she had been so.

**Evidence—(Contd.).**

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| blitten. The statement was not relevant under section 6 of the Evidence Act. <i>Sroohari Swarnakar v. Emperor</i> ...                                                                             | 524 |
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| <b>Ex parte decree—Legality—Application by defendant for adjournment on the date fixed for hearing rejected—Time allowed for adducing evidence—Suit decreed ex parte on that very day.</b>        |     |

On the date fixed for the hearing of a suit the defendant made an application for adjournment on the ground that he was ill. The Court rejected the prayer but allowed him 5 days' time to adduce evidence. The Court then took plaintiff's evidence and without waiting for the said 5 days decreed the suit *ex parte* on that very day. An application was made to set aside the *ex parte* decree which was refused:

*Held*, that the trial Court was not justified in passing the *ex parte* decree on that very day and consequently the decree was wrong in form.  
**Rajabala Dasi v. Jai Chand Lal Babu** ...

|                                                                                                                                                                                                                                                                                                             |     |     |
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A, a putnadar, died after executing a will, leaving his sons defendants Nos. 2 to 4. Defendant No. 1 his brother, was appointed executor. The putni was sold after A's death in execution of money decree against A and was purchased by defendants Nos. 1 to 4. The defendants Nos. 1 to 4 defaulted in the payment of putni rent for the years 1328 and 1329 B. S. The plaintiffs purchased the putni at a sale held under Reg. VIII of 1819 in 1331 for arrears of rent for 1330 B. S. Defendant No. 1 was discharged from his position as executor before the institution of the present suit for recovery of arrears of rent for the years 1328 and 1329 B. S. Prior to the present suit the rights of defendant No. 1 and defendants Nos. 2 to 4 were adjusted by a partition deed:

*Held*, that though the rent for which the suit was instituted accrued due during the period when defendant No. 1 was in charge of the estate as executor, he, the defendant No. 1 was not personally liable for the rent.

That as the putni was purchased by the executor defendant No. 1 in the ordinary course of management with assets which came into the hands of the executor at the time of the death of the testator, and in the absence of any proof that the putni did not bring any income during the period when it was in possession of defendant No. 1 as executor, the latter was entitled to be indemnified out of the testator's estate against the liabilities which he had properly incurred.

That the plaintiffs with whom the executor contracted to pay rent stood in the shoes of the executor and had the same indemnity as the executor had against the testator's estate and the executor had a right to an indemnity out of the assets of the testator's estate, which included the

**Executor—(Contd.)**

|                                                                                                                                                                                                                                                                                       |     |
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| after-acquired assets, namely, the putni. <b>Rajendra Narayan Basu Sarbadhikary v. Debendra Nath Mukhopadhyaya</b> ...                                                                                                                                                                | 70  |
| ———, if entitled to be indemnified out of the testator's estate against the liabilities properly incurred—Purchase of putni by executor in the ordinary course of business with assets of the estate—Sale of putni under Putni Regulation; <i>see</i> Executor ...                    | 70  |
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| A revising Court has jurisdiction to order a further enquiry on the same materials.                                                                                                                                                                                                   |     |
| A superior Court should hesitate before exercising its power under section 437 of the Code of Criminal Procedure to order further enquiry unless there are palpable errors in the decision of the lower Court.                                                                        |     |
| Where the District Magistrate in ordering further enquiry has not given any indication in his judgment that there have been such palpable errors in the judgment of the trial Magistrate, he is not justified in holding it to be wrong. <b>Sulav Chandra Das v. King-Emporer</b> ... | 284 |
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The power of reference conferred upon the Presidency Magistrate by section 432 of the Code of Criminal Procedure is confined to questions of law which the Magistrate requires to decide in order to perform his duty in disposing of the case before him ; and the Magistrate should not refer to High Court questions of law unless they are matters upon which he has a duty to make up his mind.

Under Act XIII of 1865, the foundation of the jurisdiction of the High Court was the written instrument of charge (or as it is now called the order of commitment) signed by the Magistrate and delivered by him to the Clerk of the Crown. It was only after charges so made had been recorded that the accused were to be deemed to have been brought before the High Court in due course of law. After 1865 the power of the Court to quash an indictment had become power to quash the charge comprised in the written statement of charge delivered by a Justice of the Peace to the Clerk of the Crown.

The written instrument of charge has a double aspect : it is in the first place an order of the Magistrate, and in the second place the foundation of the jurisdiction of the superior Court.

The internal arrangements of the High Court are dealt with by its Rules and the Criminal Procedure Code does not decide what functions can be exercised by a single Judge or must be exercised by a Division Bench. It deals with the High Court as one and the definitions of High Court are not intended to do more than to point to the Court itself so as to distinguish it from other Courts.

The concern of the Judge of the High Court with section 215 of the Code of Criminal Procedure is that he is bound to see that he does nothing which the section prohibits.

Section 532 of the Code of Criminal Procedure is directed to the case of

**High Court—(Contd.).**

commitments that are bad by reason of a defect personal to the committing officer. It envisages a Magistrate purporting to exercise powers duly conferred upon him and this is a reference to section 206. The case supposed is one in which everything that has been done has been regular but the person who has committed the accused for trial is not empowered so to do. This section has no reference to a case in which a Magistrate who has general powers to commit an accused person to the High Court commits an accused over whom he has no jurisdiction or commits him for an offence which, upon a true construction of the Code, is not triable by a Court of Session or High Court. For the limited purposes of the section the Court of Session as well as the High Court has to make up its mind whether to accept a commitment or to quash a commitment. The section is a curing or remedial section and it must be strictly interpreted in the interests of accused persons. This section does not assume or imply that the High Court at a trial has no other authority to quash a commitment.

Section 273 of the Code of Criminal Procedure, which gives a special power to High Courts, has no reference to cases of illegal commitment. It is intended to provide a short and effective way by which charges which have no merits may be disposed of.

A Judge exercising the jurisdiction of the High Court under the Presidency Towns Insolvency Act being of opinion that there were grounds for thinking that certain insolvents had committed offences under section 103 of the said Act, made a complaint under section 104 thereof to the Chief Presidency Magistrate of Calcutta. The Magistrate formally committed the three accused to the High Court Sessions. The case came before Buckland, J., in the Ordinary Original Criminal Jurisdiction of the High Court. The learned Judge took the view that as on conviction for an offence under section 103 of the Presidency Towns Insolvency Act, the maximum punishment to which the accused is liable is imprisonment for a term which may extend to 2 years and as there is no provision for imposition of a fine in addition to imprisonment, it was not possible to say of the offence charged that it could not be adequately punished by the Magistrate who has power to impose 2 years' imprisonment. In this view, being of opinion that the commitment was illegal, Buckland, J., directed that the commitment be quashed and that the record, with a copy of his judgment, be returned to the Chief Presidency Magistrate in order that he might deal with the complaint according to law. When the matter went back to the Magistrate, the accused filed a petition contending that the order of Buckland, J., read as a whole amounted to a discharge of the petitioners. The Chief Presidency Magistrate, acting under section 432 of the Code of Criminal Procedure, asked the Hon'ble High Court to express its opinion, in substance, upon three questions: (1) Whether the learned Judge at Sessions had power to quash the commitment; (2) Whether he was right in law in quashing the commitment for the reasons given by him; and (3) Whether it is competent for the Magistrate to proceed in the absence of a fresh complaint or whether he

**High Court—(Contd.).**

can proceed with the case as it stood prior to his passing the order of commitment :

*Held*, that for the purposes of this case the Magistrate should have taken the order of Buckland, J., as an effective order quashing the commitment and proceed with the case as a warrant case under the provisions of Chapter XXI of the Code of Criminal Procedure.

That it was necessary for the Magistrate in this case, to go back to the point at which he took cognizance of the complaint. The Magistrate must begin the trial afresh under section 252 of the Code of Criminal Procedure. There was no need whatever for a fresh complaint.

That it was not open to the Chief Presidency Magistrate to ignore the order of Buckland, J., and to treat it as null and void. The order of Buckland, J., was a valid and subsisting order. *Emperor v. Girish Chunder Kundu* ... .. 408

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**Income tax**—*Salami*—*Lease*—*Forfeiture clause*—*Waiver*—*Resettlement*—*Income Tax Act (XI of 1922), Secs. 9, 10.*

Where the *assessee* is the owner of property consisting of any building or land appurtenant thereto, the statute charges him upon the basis of a notional income the amount of which is computed by finding the *bona fide* annual value and making the deductions therefrom which are allowed by section 9 of the Indian Income Tax Act. Where the *assessee* has only a limited interest, namely, the interest of a lessee for 50 years, section 9 may be inapplicable. If the circumstances are not such that the *assessee* can be regarded as carrying on a business in house property, the *assessee* cannot be made liable upon principles which are applicable only to persons carrying on business.



**Income Tax—(Contd.)**

Where the letting out of property upon lease for *salami* and for rent, the forfeiting of lease where possible and the exaction of fresh *salami* and increased rent are all acts done in the carrying on or carrying out of a business in house property, that sum was earned as part of a profit of the business, and is assessable accordingly to tax. But the assessee will be entitled to the allowances in respect of depreciation on buildings, machinery, plant or furniture prescribed by cl. (vi) of sub-section (2) of section 10. "Profits" implies a comparison between the state of a business at two specific dates usually separated by an interval of a year, and if the company is to be regarded as dealing in house property by letting out for premium and rent in the course and for the purpose of its business, the money value of the extent to which at the end of a year it had bettered its position by such means will be assessable as profits. If its position has been bettered by other means, from causes not directly connected with the business of the company, the enhanced value though realized is not part of the profits of the business. Everything depends upon what the business is.

If the expenditure required to obtain the income from the capital asset is negligible the case is a case of a man in receipt of a clear revenue therefrom. If some considerable expenditure is necessary before the annual return can be obtained then the history of the year will be stated in the form of a "Trading" or "Revenue" account or account of the receipts and expenditure during the year. It is essential when accounting on this basis to exclude from either side of the account matters which in substance represent only a rise or fall in the value of the asset from which revenue is derived as distinct from the net revenue itself or which represent only a change in the form of the investment, whether the change be a change into money or into some other form of property.

Cases of *salami* or premium upon a lease may present considerable difficulty in maintaining the distinction between capital and revenue accounts.

The assessee was a limited company who in 1922 took a lease for 50 years from the representatives of R of certain properties which included the premises known as 100 Clive Street, Calcutta. This lease was subject to a building lease previously granted in June, 1920, by the executors of the will of R, whereby the premises 100 Clive Street were demised for 50 years to the Tata Industrial Bank Limited on a monthly rent of Rs. 5,000. The Tata Industrial Bank Limited had paid a premium or *salami* of one lac of rupees and by the terms of the lease had undertaken to demolish the building then standing on the demised premises and to erect thereon a new office building in accordance with conditions to be approved by the lessors. In August 1923, the Tata Industrial Bank Limited having expended a large amount of money upon the erection of the new building went into voluntary liquidation for the purpose of a scheme of amalgamation with the Central Bank Limited. Thereupon the assessee taking advantage of a forfeiture clause in the lease

**Income Tax—(Contd.)**

of 1920, which gave power to the lessors to re-enter if the Tata Industrial Bank Limited should go into liquidation, claimed to determine the lease and demand immediate possession. The Central Bank of India Limited, faced with this claim, compromised with the assesses who waived the forfeiture and agreed to a transfer of the lease to the Central Bank Limited in consideration of a lump sum payment of one lac of rupees and a further monthly payment of Rs 750 during the residue of the lease. The sum of one lac was paid by the Central Bank Limited to the assesses on the 21st December, 1923. Income tax authorities for the year of assessment 1927-28 claimed to treat this sum as part of the assessable income of the assesses :

*Held*, that the sum of one lac of rupees paid by the Central Bank was to be regarded as a *Salami* or premium in the ordinary sense but could not be treated as an assessable income. *In re Gooptu Estate Limited* ... .. 375

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**Jurisdiction—(Criminal Procedure Code (Act V of 1898), Secs. 133, 139A—Magistrate making over enquiry as to existence of right to subordinate Magistrate—Test.**

**Jurisdiction—(Contd.)**

In proceedings under section 133 Criminal Procedure Code relating to alleged obstruction of a public *gopath*, the opposite party (the petitioners) denied the existence of the right. The Magistrate passed an order making the case over to a third class Magistrate for enquiry and to report to the existence of a public path. His report was submitted and the Additional District Magistrate took the report into consideration and acted upon it by passing an order declaring it to be a public path. Matters then proceeded before a jury, the majority of whom found that the obstruction should be removed :

*Held*, that the Magistrate had no jurisdiction to make over the enquiry to a subordinate Magistrate.

That under section 133 of the Code of Criminal Procedure the proceedings should be in the hands of a District Magistrate and not in the hands of a Magistrate having 3rd class power.

The test was whether there was or was not reliable evidence in support of the denial of the existence of the alleged public right. *Innsaddar Ali*

*v. Isimulla* ... ..

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**Jury, verdict of—Reference—Criminal Procedure Code (Act V of 1898), Sec. 307—Culpable homicide—Medical evidence and post mortem report inconsistent with the prosecution story of murder—Deposition of the medical officer before the committing Magistrate tendered in evidence in the recorded form before the jury—Medical Officer not called before the jury—Unpardonable carelessness on the part of the prosecutor—Mis-carriage of justice—Verdict of acquittal justified—Time of death—Opinion of medical officer after post mortem examination to be recorded at the earliest opportunity.**

The accused was tried upon a charge that he, on the 14th April, 1923 committed culpable homicide by killing his wife by an instrument. The defence was that while the wife was cooking in the kitchen a part of the wall fell upon her and she died at a time when he was absent but which he discovered after returning home. The medical evidence was equally inconsistent with the view that the wall fell down upon the wife and killed her as with the view that she was beaten to death with any instrument by the accused. It further says that the death might have taken place 3 days before the post-mortem examination, which was held the next day after the alleged date of occurrence. The only thing done was that the deposition of the medical officer, who held the post-mortem examination, was put in before the committing Magistrate as part of the evidence but the medical officer was not called and examined before the jury :

*Held*, that in a case of this type where everything depended upon the medical evidence and upon the jury being able to satisfy themselves as to what the medical facts really were, the prosecution had no right to

**Jury—(Contd.)**

stand merely upon the deposition in its recorded form; that it was gross carelessness on the part of the prosecution not to call the medical officer himself or to give any medical evidence in the hearing of the jury, when the statement given as a medical opinion by the Doctor who held the post-mortem was utterly inconsistent with the prosecution evidence.

*Held*, further that in serious cases of murder or of manslaughter the jury cannot convict the accused unless a proper exposition and explanation of the medical evidence is given *vis-à-vis* by a Doctor who can deal with the matter and satisfy the jury. The jury are quite entitled to be fully satisfied.

*Held* also, that under the circumstances of the case the jury was entirely right in acquitting the accused; that it was not necessary to hold further enquiry into the matter.

*Held (per Buckland, J.)*. The medical officer who makes the post-mortem examination should record at the foot of the post-mortem report form the length of time which in his opinion has elapsed since death took place. *Emperor v. Debendra Narain Chakravarty* ... .. 1

—, verdict of, High Court, when interferes with; *see* Reference ... .. 518

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**Kabuliat—Material alteration** *Proof of suspension of rent—Proof of additional rent for excess land—Presumption arising under Bengal Tenancy Act (VIII of 1885), Sec. 50, rebuttal of.*

Whenever any instrument is purposely altered by a person in lawful possession of it in a material part of it, the instrument is void for the purpose of enabling any person to sue on it or to defend himself by using it as a direct defence depending on its obligatory force as an instrument.

A landlord in a proceeding under section 105 of the Bengal Tenancy Act put forward a Kabuliat and asked for Rs. 5 to be allowed because that sum was, on the basis of the terms of the Kabuliat, a suspension of rent on account of  $3\frac{1}{2}$  bighas of the holding being submerged under water at that time. He asked secondly for enhancement of rent because of rise in the price of the crops and thirdly additional rent for additional area. The Kabuliat showed that the *jama* was created in 1275. In that Kabuliat there was an interpolation, "Measurement of the land will be made in accordance with the terms of the Kabuliat by a *rasi* of 80 cubits, 1 cubit being equal to 18 inches":

*Held*, that the Kabuliat was not evidence at all on the part of the landlord as regards Rs. 5 the suspended rent, as to additional rent for excess area, and as to rise in the price of staple crops.

That the Kabuliat could not be used to show the origin of the tenancy to rebut the presumption arising under section 50 of the Bengal Tenancy Act. *Haran Chandra Karmakar v. Kishori Lal Ghosh*. ... .. 173

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**Kidnapping—Indian Penal Code (Act XLV of 1860), Sec. 366—'Forced or seduced'—One charge of kidnapping and abduction—Accused reticent—Inquisitorial proceedings—Evidence Act (1 of 1872), Secs. 65, 66—Contents of a letter—Notice to produce not given—Sufficiency of search.**

The word 'forced' in section 366 of the Indian Penal Code ("In order that she may be forced or seduced") is used in its ordinary sense, which includes forced by stress of circumstances.

The word 'seduced' in section 366 of the Indian Penal Code ("In order that she may be forced or seduced"), though sometimes used to mean to induce a girl to part with her virtue for the first act of seduction, also means subsequent seduction for further acts of illicit intercourse.

If the girl is 16 or over, she can only be abducted and not kidnapped, but if she is under 16 she can be kidnapped as well as abducted if the taking is by force or the taking or enticing is by deceitful means.

A charge setting out charges of kidnapping and abduction under section 366 of the Indian Penal Code, is not bad.

If an accused prefers to be reticent, the Court should not hold an inquisitorial proceeding.

The fact that the accused declines to make a statement will not necessarily indicate to the Judge that the accused cannot like to answer specific questions put to him.

Where oral evidence was given to prove the contents of a letter, which was neither produced nor called for, and no objection was raised to the giving of evidence, the secondary evidence was inadmissible under section 66 of the Evidence Act and the subsequent dispensing with of the notice would not make the evidence admissible that was inadmissible at the time it was given. In this case, it was held to be a technical defect of procedure as also it was not a case under section 65 Cl (a) but under Cl. (c) of that section. It was therefore only a question of sufficiency of the search that should have been made for justifying the reception of secondary evidence. *Profulla Kumar Bose v. King-Emperor* ...

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**Laches** Final decree: *see* Appeal, if competent. ...

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**Landlord**, when can re-enter on the ground of abandonment—Proof; *see* Abandonment ...

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**Landlord and tenant—Interfering with water supply—Tenant suffering from scarcity of fresh water—Indian Penal Code (Act XLV of 1860), Sec. 430—Right infringed—Intention—Proper course for tenant to follow.**

A certain Abad, which a few years ago jungle, was made cultivable to some extent by raising Bunds to protect it from rivers which surrounded it on three sides. It was divided into three Chaks. The complainants were the tenants of one of these Chaks. In this Abad, there were a large number of small as well as some large Khals and the

**Landlord and tenant—(Contd.)**

opening of the large Khals was controlled or closed by sluice gates. In the ordinary way during the rains these Khals got filled with rain water which was not saline or not so saline as the river water. After the rains and at a time when there were no crops or agricultural operations going on, the Malik recently made up their mind to fish in a special manner, that is to say, by cutting the Bunds of the small Khals so as to let out a considerable amount of water and then placing what is called Khalt or obstruction of some kind at intervals along the small Khals and bailing the water out into the next higher part. For purposes of fishing in this manner, the Malik for the first time emptied out all the small Khals with the result that the tenants of the Chak suffered from a scarcity of fresh water :

*Held*, that before the landlords or their agents could be convicted under section 430 of the Indian Penal Code for interfering with the water supply, it must be made abundantly clear that the landlords could not have a right to do what they did with reference to the Khals. If the tenants had no legal claim to have the water in these Khals preserved in such a way that they could use it either for purposes of agriculture or otherwise then, though the conduct of the landlords might be very shabby or very objectionable, it was not an offence under section 430 of the Indian Penal Code, the essence of which was that they intentionally inflicted wrongful loss upon the tenants. Such a case could only succeed where the right infringed was reasonably clear and plain. A complicated question of civil law was to be considered before it could be decided whether the tenants had any actual right to this water or not.

The proper course for the tenants, if they desire to assert a right to have the water in these Khals kept in such a way as they could use it, was to take proceedings for an injunction in a Civil Court or to take measures by which the rights of the parties could effectively be ascertained.

**Ashutosh Ghose v. King-Emperor** ...

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**Law, question of—Terms contained in a correspondence amounting to a binding contract between the parties ; see Specific performance** ...

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**Lease—Receiver, if can grant—Misrepresentation or concealment of material facts—Disadvantageous—Debutter property—Benefit.**

A Receiver has no power to lease a debutter property without the sanction of the Court. Any misrepresentation or concealment of material facts from the Court in connection with a proposed lease would vitiate the authority of the Receiver to grant the lease.

A lease is liable to be cancelled if it be disadvantageous and not for the benefit of the debutter estate. **Srish Chandra Banerjee v. Debedra Nath Banerjee** ...

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**Lease for Salami and for rent—Forfeiture clause—Exaction of fresh Salami and increased rent—Profit of business ; see Income tax** ...

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Where an application for execution is, having regard to the nature of the relief sought and other surrounding circumstances, essentially different in character from a previous application which the decree-holder had virtually abandoned, and marks a substantial departure therefrom, it cannot be regarded as a continuation of the execution proceedings initiated by the earlier application, but must be treated as a “fresh” application for execution within the meaning of section 48 of the Civil Procedure Code, 1908, and would be barred by limitation if presented more than twelve years from the date of the decree sought to be executed.

Maharaj Bahadur Singh v. A. H. Forbes ... .. 345

——— Indian Limitation Act (IX of 1908), Sec. 9, Sch. I, Art. 134,  
 \* 140, 148—Transferee from mortgagee, when entitled to protection of

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*Article 134—Life-tenant purporting to act as absolute owner and dealing with the property as such—Reminderman, accrual of rights of—New plea of limitation raised for first time in appeal—Material facts neither proved nor admitted—Continuous running of time.*

A defendant cannot be allowed to urge a new plea of limitation for the first time in an Appellate Court on a point not taken before the trial Judge, where no evidence had been given in the Court below to support the plea, and the facts which the defendant must establish to substantiate the new point thus raised are neither proved nor admitted.

It is highly irregular for any Court either to assume without the admission of all parties that material facts are not in dispute or to proceed to draw inferences from those facts where no evidence of them has been placed before the Court.

When time has once commenced to run, it will not cease to do so by reason of the happening of any subsequent event (section 9, Indian Limitation Act).

The transfer of property by mortgage contemplated by article 134 of the Indian Limitation Act, 1908, is admittedly something other than an express transfer of the original mortgage. The article contemplates a transfer by a mortgagee purporting to transfer a larger interest than that given by the mortgage or at any rate an interest unencumbered by a mortgage. The Article is not, however, limited in its application to cases where the mortgagee transfers the property mortgaged while still ostensibly a mortgagee, nor to cases where the mortgagee transfers possession which he had obtained *qua* mortgagee. For the application of Article 134, it is immaterial that the mortgagee should have thought he was absolute owner if in fact he was mortgagee, and immaterial whether he got possession before, under or after the mortgage if in fact he purported to transfer the property to the transferee.

Article 134 does not protect the transferee of a mortgage by express transfer, nor does it protect a person who has taken a transfer only of a mortgage, but has taken it without his knowledge mistakingly supposing that he was getting something better.

In September, 1863, Thomas Skinner, the plaintiff's father, created a simple mortgage of the five villages in suit in favour of Seth Lakshmi Chand and Seth Gobind Das (hereafter referred to as the Seths), with a covenant to put the mortgagees in possession on default of payment of principal and interest on the due date. The principal was not so paid, but the mortgagees did not enter into possession during the mortgagor's lifetime. In October 1864, Thomas Skinner made a Will by which he left successive life interests to three of his sons with ultimate remainder to his daughter, the plaintiff in the present suit. Each interest was contingent on the holder of the prior estate dying without lawful male issue. In the next month (November 1864) Thomas Skinner died and his eldest son Thomas Browne Skinner became tenant for life, but assuming in point of fact an absolute interest in the property and acting on the



**Limitation—(Contd.)**

footing that he was the absolute owner of his father's Thomas Skinner's estate in the villages, he, Thomas Browne Skinner in November 1867 mortgaged the villages aforesaid, with possession, to the Seths for Rs. 50,000, which was expressed to include Rs. 43,294 due on the original mortgage of 1863. In 1872, in execution of simple money decrees against Thomas Browne Skinner, his equity of redemption in the villages was sold to the Seths, who therefore entered into possession of them on the footing of being absolute owners. In December, 1898, the Seths, purporting to be absolute owners, mortgaged with possession the five villages to the Nawab of Rampur "with all the proprietary and zemindari rights" and in September 1903 they sold the whole of the mortgaged property (including the five villages in suit) to the mortgagee, the Nawab of Rampur, in satisfaction of all claims under the mortgage. In April 1904 the Nawab of Rampur, describing himself as the absolute owner of the suit villages, sold them to the defendant, Kunwar Naunihal Singh.

The three sons of Thomas Skinner who were successively life tenants under his will having died, without legitimate male issue, in 1900, 1913 and 1919 respectively, the plaintiff (his daughter) succeeded to an absolute interest in the property of her father, Thomas Skinner, and she brought the present suit, in 1920, against the defendant, Kunwar Naunihal Singh, for redemption of the five villages:

*Held*, (treating the suit as one to redeem the mortgage of 1863 created by Thomas Skinner) (the defendant's predecessors-in-title not having acquired an absolute title through Thomas Browne Skinner, who took only a life-interest though purporting to act as absolute owner in mortgaging the property to the Seths in 1867) that the suit was not barred by Article 134, of the Indian Limitation Act and was well within the period of limitation prescribed by Article 135, the statutory period of 60 years, computed from the original mortgage of 1863 not having expired when the plaintiff filed the present suit in 1920, and that in any case, by Article 140 the plaintiff's right to sue as a remainderman under her father's will did not arise until 1919, when on the death of her last surviving brother without issue, she by virtue of the remainder to her, became entitled to possession. **James Richard Rennel Skinner v. Kunwar Naunihal Singh** —

**Limitation—Indian Limitation Act, (IA of 1908), Sch. I, Art. 127—Exclusion from joint family property—Intention to exclude—Plaintiff ceasing to reside in family house and not receiving maintenance, etc., from the other members—Onus probandi on defendants—Recitals in deed, as corroborative evidence.**

The question whether the plaintiff has been excluded from joint family property within the meaning and for the purpose of Article 127 of the Indian Limitation Act, 1908, must depend upon the facts of each particular case. An intention to exclude is an essential element of the definition of the word "exclusion" in the Limitation Act, and it is, there-

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fore, necessary for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude the plaintiff from his share of the joint family property when he should choose to assert his rights.

The circumstance that the plaintiff voluntarily ceased to reside in the family dwelling-house; that the members of the joint family (in control and possession of the joint property) did not subscribe towards his maintenance, education or marriage expenses, and that for many years the plaintiff did not exercise his right to partition, while material for consideration, is not decisive on the question of his exclusion from the joint family property.

In a suit by a member of a joint Hindu family for his share in the family property, where the defence is that the suit is barred by limitation, the *onus probandi* is on the defendant to establish that the plaintiff was excluded from the joint family property to his knowledge for more than 12 years before the date of the suit.

*Held*, on the evidence, (reversing the judgment of the High Court), that the defendant had failed to discharge the *onus* of proving the exclusion on which they relied.

Recitals in a deed are admissible in evidence as corroboration of the testimony given by the party thereto and his witnesses upon material matters recited in the deed. *Radhoba Baloba Nagh v. Aburno Bhagwantrao Shridh* ... ..

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— Indian Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—  
Amended decree—Appeal—Execution—Computation of time—Terminus  
a quo—Civil Procedure Code (Act V of 1908), O. XXI R. 16—Sub-  
mortgages of the decree—Right to execution—Person interested in the  
decree.

An appeal from an amended decree like that from any other decree postpones the date from which limitation runs for execution purposes.

The broad principle as regards execution matters is that time is not computed from the date when the right to apply accrues but is postponed in cases where there is an appeal.

A final mortgage decree was passed on the 10th of October 1917. On the 8th April 1919 on the application of the decree-holder, that decree was amended. The judgment-debtor preferred an appeal to the Court of the District Judge who modified the amended decree. From that decision an appeal was taken to the High Court which was dismissed on the 24th of July 1924. The decree-holder then presented an application for execution of the decree on the 18th November 1925.

*Held*, that the application was not time-barred; that the correct date for determining the time of limitation under Art. 182 of the first schedule to the Limitation Act was the 24th July, 1924.

After the application for execution was presented by the original mortgagee decree-holder a sub-mortgage of the said decree for Rs. 900 was made in favour of K, the appellant which provided that "K would be

**Limitation—(Contd).**

competent to realize the above sum being added as a party to the above execution case jointly with us. ....K would be competent to withdraw the sum due to him together with interest and costs..... Should the original mortgagees fail to pay the money lent within..... K would be competent to realize the sum due to him by bringing a suit against his borrowers or by execution of the above decree in his own name” :

*Held*, that K comes within the description of persons given by Rule 16 of Order XXI, Code of Civil Procedure, and has sufficient interest in the decree to proceed with the execution. **Nagendra Nath Banerjee v.**

**Ambika Charan Chakrabutty** ... ..

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— *Limitation Act (IX of 1908), Sch. I. Arts. 120, 141—Suit by reversioner for declaration—Subsequent suit for possession after the death of widow—Causes of action, distinct—Reliefs, different—Civil Procedure Code (Act V of 1908), O. 2, R. 2—Suit for *Malikana*—Grant of certificate under The Pensions Act (XXIII of 1871)—Right of action as regards *Malikana*—Time, running of—Decree obtained against widow, effect on reversioner—No decree against widow—Adverse possession against widow.*

At the time when A died on the 30th October, 1875, there were living his daughter, the plaintiff, his mother, his widow (plaintiff's mother, hereinafter called mother) and his brother's widow (plaintiff's aunt, hereinafter called aunt). The estate of A included several villages, an 8 annas share in the village of P—the other 8 annas share was owned by D—and a house at W.

After A's death the aunt got possession to the exclusion of the mother (of the plaintiff), of some of the villages or of a half share therein and also of the house at W.

By a document dated the 13th September 1880, D, the mother and the aunt affected to release the village of P to the Government in return for a perpetual *Malikana* of Rs. 2000, one half of which represented the share of A's estate in the village and the other half of which represented the share of D.

By a sale deed dated the 6th October, 1880, D made over Rs. 500, representing one-half of her share in the *Malikana* to the mother and aunt in satisfaction of his indebtedness to A's estate. Thereafter the mother and the aunt received payment of the *Malikana* of Rs. 1500 in equal moieties.

In 1886 the mother instituted a suit against the aunt, seeking to establish her title as an heir to A to the villages, or share of villages, in the aunt's possession, and to dispossess the aunt therefrom and to establish her title to the whole of the *Malikana* of Rs. 1500. No reference was made in the plaint to the house at W. She obtained judgment in her favour in July 1894 in respect of the villages, but the Court held that in the absence of a certificate under the Pensions Act, 1871, it was not competent to deal with the *Malikana*. The effect of it was that the mother

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received possession of all the villages, but the aunt continued to receive one-half of the *Malikana* of Rs. 1500 and remained in possession of the house at W.

In 1890, the plaintiff instituted a suit against the mother and the aunt, seeking to establish her title as reversionary heir of A, subject to the mother's interest as widow to the immoveable property of A mentioned in the plaint, including the villages of which, or of a share of which, the aunt had possession. The plaintiff also sought to have a document dated the 9th October, 1877, purporting to be an arbitration award on which the aunt relied, declared invalid. The plaint referred to the village of P, but contained no reference to the house at W. In January, 1894, she obtained a decree in which it was stated that she was entitled to succeed to the property in dispute on the mother's death, and that on the mother's death the arbitration award of the 9th October, 1877, and other proceedings by which the aunt had become possessed of the property in dispute would be void as against the plaintiff.

In February, 1914, the mother died, and therefore, the plaintiff succeeded to the property, possession of which had been recovered from the aunt.

The aunt died on the 20th June, 1920, having by her will, dated the 3rd July, 1919, affected to dispose in favour of her nephew, the defendant, of the share of the *Malikana* which she was receiving and of the house at W.

On the 15th December, 1910, the plaintiff having first obtained the necessary certificate under the Pensions Act, 1871, instituted the present suit and asked *inter alia* for the following relief:—(a) That it might be declared that the alleged will of the aunt was invalid and unenforceable against the rights of the plaintiff, and that by means of it the defendant had not acquired any rights to get Rs. 750, the *Malikana* amount or any right in other property in respect of which the will had been made and (b) that the plaintiff might be put in possession of the ~~manuf~~ property and the house at W by dispossession of the defendant:

*Held*, that the plaintiff was not precluded by reason of rule 2 of order 2 of the Code of Civil Procedure from bringing a suit for possession of the house at W, though no claim was made in her previous suit against mother and aunt seeking to establish her title as heir, as the cause of action in the present suit was distinct from that in the previous suit and that as the present claim of the plaintiff could not have been made in the previous suit.

That having regard to the statement in the plaint and to the form of the relief sought therein, the suit, so far as the *Malikana* was concerned being not a suit for possession, was not governed by Article 141 but by Article 130, Schedule I of the Limitation Act and that as less than 6 years had run between the grant of the certificate under the Pensions Act, 1871, and the institution of the present suit, the claim was not barred.

**Limitation—(Contd.)**

That there was no right of action at all in respect of *Malikana* unless and until a certificate under the Pensions Act, 1871, was obtained.

Where a decree founded upon the law of limitation is obtained against the widow in her lifetime the reversionary heir is barred and does not get the benefit of Article 141 Schedule I of the Limitation Act. But where there has been no decree or other act in the law in the widow's lifetime, though at the death of the widow, a stranger has been in adverse possession for 12 years or more, the heir is entitled, after the widow's death, to rely upon Article 141, Schedule I, of the Limitation Act, for the purpose of the determination of the question whether the title is barred by lapse of time.

The point as to the *Malikana* not being immoveable property being not taken in either of the Courts below, and each of the Courts below having treated the *Malikana* as immoveable and the defendant objector not being willing that there should be any remand of the case for further evidence, their Lordships of the Privy Council held that the point was not open. *Muhammad Jaggo Bai v Utsava Lal* ... ..

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—, *Limitation Act (IX of 1908), Sch. I, Arts. 138, 148—Suit for redemption—Rights of prior and subsequent mortgagees—Purchaser in prior mortgagee's decree—His right to redeem.*

If a person is joined as a defendant for enforcement of the right under a mortgage, he should be dismissed from the action as soon as he sets up a prior title.

When a puisne mortgagee is not made a party to a suit by the first mortgagee, his rights are not affected by a decree or sale thereunder and the puisne mortgagee has still the right to redeem the prior mortgagee. He may notwithstanding the prior decree bring a suit on his mortgage.

When the first mortgagee brings his suit without impleading the puisne mortgagee, obtains a decree against the mortgagor only and purchases the property himself, he purchases the outstanding interest of the mortgagor only and the puisne mortgagee's rights are not affected in any way. A suit by the puisne mortgagee, who purchased the property in execution of his mortgage decree, for redemption, is maintainable, if not barred by limitation.

A suit for redemption by a person entitled to redeem is governed by Article 148 Sch. I of the Limitation Act.

Defendant No. 1 brought his suit on his mortgage without impleading the plaintiff and obtained a decree for sale against the mortgagor alone on 30th November, 1911. Plaintiff brought a suit to enforce his mortgage in 1915. He made the present defendant a defendant in the suit along with the mortgagor and a transferee from him. The defendant set up his prior mortgage and plaintiff's suit as against him was dismissed as the plaintiff did not ask for any decree against him. The plaintiff obtained the usual decree for sale as against the other defendants in that suit on 8th May, 1915. Defendant in execution of his decree purchased the mortgaged property himself on 15th August, 1916, and obtained

**Limitation—(Contd.)**

possession. Plaintiff afterwards, on execution of his decree purchased the property on 19th November, 1920 but obtained possession only of plot No. 2 of the mortgaged property :

*Held*, that the suit by the plaintiff for redemption of plot No. 1 of the mortgaged property on payment of the mortgage money due on the mortgage of defendant and for possession, was governed by Article 148 and not by Article 133, Sch. I of the Limitation Act and was not barred.

The defendant's right to redeem the plaintiff would depend upon the question as to the preferential right to the equity of redemption under the respective sales under the decrees obtained by the parties on their mortgages. *Sayamall Molla v. Anisuddin Molla* ... .. 152

— *Limitation Act (IX of 1908), Sch. I. Arts. 141, 143—Adverse possession against Hindu widow—Suit by reversioner after widow's death.*

A suit brought by a reversioner for possession of immovable property to the possession of which a female heir had been entitled is not barred if brought within 12 years from the death of the female heir, although she may have been out of possession for more than 12 years. It is only barred when the adverse possession was the result of a decree which is binding against the reversioner :

Article 143, Schedule I of the Limitation Act has no application where the relationship of landlord and tenant does not exist between the parties. *Abhinash Chandra Ghosh v. Narhari Mitter* ... .. 260

— *Special rule—Bengal Tenancy Act (VIII of 1885), Sch. III—Suit for jalkar rent—Agreement for lease in respect of Bheri land—Jalkar—Liability to repair embankments in the interest of fishing—Case, if covered by 'rights over fisheries'—Bengal Tenancy Act, Section 193—Applicability.*

A memorandum of agreement for lease for a term of 3 years in respect of the right to fishery over two pieces of Bheri land, goes to describe those two pieces of land as Bheri Jami Jalkar and it recites that these two pieces of Bheri land Jalkar are in the possession and enjoyment of the grantees under a previous lease. It then recites the terms of agreement thus : " that for the right to fishery over the first Bheri Rs. 500 shall be paid in advance as solami and the rent shall be fixed at Rs. 3000 per annum and that for the right to fishery over the other Bheri land Rs. 500 shall be paid in advance as solami and the rent shall be fixed at Rs. 1500 per annum . . . . . On the aforesaid understanding we take lease of the said two pieces of Bheri land Jalkar running from...and having the right of possession over the said two pieces of Bheri land Jalkar as Nij Jote execute this kabullat ..... We shall at our own cost make necessary and regular repairs of the sluices and the embankments surrounding the Bheri during the term of the lease and we shall make other necessary expenses. We shall be in possession by

**Limitation—(Contd.)**

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| growing fish and catching them ..... We shall keep in tact the boundary and shall make regular repairs of the embankment on all sides strong and durable as they were previous to our taking the lease." In a suit brought by the plaintiff for recovery of arrears of rent in respect of the said Jalkar : |     |
| <i>Held</i> , that the case is covered by the expression "rights over fisheries" provided in section 193 of the Bengal Tenancy Act and that the special rule of limitation provided in the Bengal Tenancy Act is applicable to this case. <i>Nani Lal Mandal v. Priyanath Roy</i> ... ..                    | 19  |
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*Per Curiam* : Offence under section 454 Indian Penal Code is in some cases a minor offence to offence under section 395. Hence alternative charges under sections 395 and 457 Indian Penal Code are not bad in law.

When it was clear from the charge that the Judge did not tell the jury that

**Misdirection—(Contd.)**

the statement of A that he himself B, C and two others were the persons who had committed the dacoity could only be used against A and therefore apparently allowed it to be used against the accused, but he entirely neglected to draw the attention of the jury to the way in which this evidence was extracted from the witness—the witness first of all made no mention whatever of the fact that A had made a statement to him in which he said that he B, C and two others had committed dacoity, and it was only in answer to the leading question by the public prosecutor which practically put into the witness's mouth the answer which he wanted that the witness stated that A had told him that he B, C and two others had committed the dacoity, neither did he give any direction to the jury as to how they should treat and the weight they should give to the evidence of an accused person as against his co accused :

*Held*, that the omission of the Judge to bring this fact to the notice of the jury seriously prejudiced the accused person.

*Per Cuming, J*: When the public prosecutor asked the permission of the Court to put questions to a witness which might be put by the adverse party, he did not intend to declare the witness hostile and to cross-examine him.

Section 154 read with section 143 of the Evidence Act provides that the Court may allow the party to put leading questions to his own witnesses. But that does not necessarily mean that he must declare the witness hostile and cross-examine him. It is only when he declares the witness hostile and cross-examines him that he cannot rely on his evidence.

*Per Lord Williams, J*: Sections 143 and 154 of the Evidence Act read together do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the Judge. Under section 154, the party may, with the permission of the Court, treat a witness as hostile and cross-examine him. The legislature did not intend to distinguish the law in this country from that obtaining in England.

**Bikram Ali Pramanik v. Emperor** ... ..

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*Judge's charge—Bare statement—Penal Code (Act XLV of 1860), Secs. 302, 304 Parts I and II.*

The spirit of the Code of Criminal Procedure demands that there shall be more than a bare statement of facts in the Judge's charge. Otherwise he can be of little assistance to the jury.

Where the Judge simply detailed chronologically the evidence given by the witnesses for the prosecution without shifting or analysing it and without directing the jury in any way upon the value or weight which ought to be or might be attached to it, he failed to give that help to the jury which he ought to have given.

The Judge after explaining sections 302 and 304 Indian Penal Code said to the jury in his charge. "If, however, you find he had neither the intention nor the knowledge requisite under section 302 consider his liability under section 304 Indian Penal Code." He then read and explained that section and continued "If you hold that he intended to

**Misdirection—(Contd.)**

cause K such bodily injury that death would be a possible but not the most probable result you will find him guilty under section 304 Part I or If you hold that he had no such intention but knew as a reasonable man that K's death would be a likely consequence of his act you will find him guilty under section 304 Part II" ;

*Held*, that the direction was wrong. **Natabar Halder (alias) Natak v. Emperor** ... ..

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*Review under Cl. (26) of the Letters Patent—Opening for the prosecution, what to contain—Introduction of highly prejudicial matters to the notice of the jury—Reading of petition of complaint in former proceeding between the parties—under another section of the Penal Code (Act XLV of 1860)—Certificate of birth, if forged—Verdict of jury, when can be set aside—Letters Patent, Cl. (26), scope of—"Review the case"—Delay—Limitation Act (IX of 1908), Sch. I, Art. 162—Topics of prejudice connected with the character of the prisoner—Grave omission to direct the jury on vital points, if can be made good by counsel's calling attention to it—Evidence Act (I of 1872), Secs. 9, 11, 80, 167—Evidence entirely circumstantial—Demeanour of witness—Contemporaneous interpretation—Defective charge—Caveat, if can be set aside.*

*Per Rankin C. J.* : (*Sukrawardy and Mukerji J.J.* concurring) : So far as Criminal cases are concerned, the opening for the prosecution ought always to be confined to matters which are necessary to enable the jury to follow the evidence when it is brought before them. This is not the stage of a case at which doubtful questions of admissibility should be either raised or decided. Whether a document is admissible or not is a matter which should always be ruled upon at the time the document is being proved or put in or the question asked of the witness. In many cases a thing may be good evidence at one stage of the case and inadmissible at another. It is frequently necessary to give evidence to lay the foundation which justifies a question or the putting in of a document. The opening speech of the counsel for the prosecution does not afford a proper occasion for the determining of such questions.

The verdict of the jury cannot be allowed to stand unless the High Court in review under clause 26 of the Letters Patent be of opinion that the same verdict would have been arrived at had they been correctly and sufficiently directed : *R. v. Pancku Das* (1). It is not open to direct retrial in such a case.

The phrase "to review the case" as used in clause 26 of the Letters Patent applies as much where a point of law is reserved by the trial judge as where the Advocate-General has given a certificate. Inordinate delay may be a matter for consideration by the Advocate-General at the time when he is called upon to consider whether a certificate should be granted. This dealing under clause 26 of the Letters Patent is not a dealing with an application for review of judgment within the meaning of article 162, Sch. I of the Limitation Act.

*Misdirection—(Contd.)*

*Per C. C. Ghose, J :* Under clause 26 of the Letters Patent, the trial Judge may reserve a point of law or points of law for the opinion of the High Court or the Advocate-General may certify that in his judgment there is an error in the decision of a point or points of law decided by the trial Judge or that a point or points of law which has or have been decided by the trial Judge should be further considered. The Court then reviews the entire case or such part of it as may be necessary and finally determines such point or points of law reserved or certified as the case may be and 'thereupon' may alter the sentence passed by the trial Court and pass such judgment and sentence as shall seem right to the Court. The word 'thereupon' has been construed to mean that the determination of the point or points of law reserved or certified must be in favour of the prisoner before the Court can interfere with the conviction and sentence. If it be found that the opinion of the trial Judge on the point or points reserved or certified cannot be supported, it is not open to High Court to direct a retrial. The Court has, no doubt, power under Cl. (26) of the Letters Patent to examine the evidence and determine for itself whether after the exclusion of the evidence or matter which may be considered inadmissible, the residue on the record is sufficient to justify the conviction. The Court will not substitute its own finding for the verdict of the jury and it must consider whether the evidence or matter improperly admitted was of such a nature that it possibly may have considerably influenced the minds of the jury and whether it was reasonably certain that the jury would, not might, have acted on the unobjectionable evidence, if the wrongly admitted evidence or matter had not also been presented to them. Section 537 of the Code of Criminal Procedure has no application to a case under Cl. (26) of the Letters Patent.

*Per Jack, J :* The High Court under Cl. (26) of the Letters Patent is to review the entire case or such part of it as may be necessary, and finally determine the point or points of law reserved or certified and therefore may alter the sentence passed by the trial Court and pass such judgment and sentence as shall seem right to the Court. A statute must be taken to mean what it says, and if the words of the statute be plain and clear, it is not for the Court to raise any doubt as to what they mean. The Court can on review, examine evidence for itself and determine without reference to the probable verdict of a jury, whether, excluding the inadmissible evidence, the residue is sufficient to justify the conclusion. The Legislature intentionally provided that the Court should be unhampered by technicalities and any attempt to introduce restrictions on the powers of the Court where there is none in the statute is to be deprecated. If the Court is convinced on the evidence that the accused is guilty he should not be acquitted merely on account of a defective charge.

*Per C. C. Ghose, J :* It is a rule of universal application that in a criminal

**Misdirection—(Contd.)**

trial counsel for the prosecution in opening the case to the jury, can only state *all* that is proposed or intended to prove in the case, so that the jury may see if there is any discrepancy between the opening statements of counsel and the evidence afterwards adduced in support of them and it is wholly improper for counsel for the prosecution to open any matter to the jury in respect whereof no evidence is intended to be or can be adduced at the trial.

Very great care must be taken by counsel for the prosecution in the observations he makes to the jury; and that topics of prejudice connected with the character of the prisoner should be carefully excluded. The fiction of law in criminal cases is that the Judge is counsel for the prisoner. The counsel for the prosecution ought not to struggle to obtain a conviction, but should regard himself rather as minister of justice, assisting him in its administration than as advocate.

(*Jack J. Contra.*) A grave omission to direct the jury on a vital point cannot be made good merely by counsel's calling attention to it at the termination of the summing up.

*Fer C. C. Ghose, J.*: Section 80 of the Evidence Act does not deal with the question of admissibility of documents referred to therein, but simply dispenses with the necessity of their formal proof by raising the presumption that everything in connection with them had been legally and correctly done; that is (i) that the documents purporting to be record of evidences or statements or confessions are genuine; (ii) that the statements as to the circumstances under which they were taken, made by the officer who affirmed his signature, are true and (iii) that the evidence, statement or confession was duly taken.

*Fer Jack, J.*: The unanimous verdict of the jurors should not be set aside on the mere speculation that certain allegations might have influenced them to some extent when it is clear that the verdict is entirely justified by the evidence.

Section 167 of the Evidence Act is imperative and applies to any decision in any case, and therefore necessarily to the decision of the High Court when exercising its powers under Cl. (25) of the Letters Patent.

Where the evidence is entirely circumstantial, no importance is to be attached to the demeanour of the witnesses, and the Judges on review under Cl. (26) of the Letters Patent can decide on the evidence as to the guilt of the accused.

A contemporaneous interpretation is the best and strongest in law

One P was tried in the High Court Sessions on charges laid under sections 193 and 471 of the Indian Penal Code. On the 19th March 1927 a Nepali girl R filed a complaint to the Magistrate charging P with diverse offences and in particular with the offence of having sold her to H for immoral purposes. She alleged that she was of the age of about 14 years and asked that process issue against the accused under section 372 Indian Penal Code. On the 6th August, 1927, the Magistrate acquitted

**Misdirection—(Contd.)**

the accused. The case for R at the High Court Sessions was that P in the course of the trial before the Magistrate had filed and made use of a document purporting to be a certified copy of an extract from the daily register of births of the year 1908 kept in Thana Dasaswamedh, Benares, with a view to show that the girl was over the age of 18 years at the time at which it was alleged that she had been sold; and that at the time when the document was filed and used as aforesaid it had been altered in four places—in two places 1909 had been altered to 1908 and in two places the name "Babar" had been inserted in front of the names of "Jung Bahadur," the effect of the forgery being that whereas the genuine entry recorded the birth as on the 19th June, 1909, and the father as being Jung Bahadur, the document as forged showed the date of birth as the 19th June, 1908, and the father as Babar Jung Bahadur.

The counsel for the prosecution insisted upon reading to the jury in his opening the whole of R's petition of complaint against P in the section 372 case. The petition alleged against P various highly prejudicial matters—that he was a man of loose morals, that he was notorious for seducing Nepali girls, that he used to keep such girls as concubines, that he had assaulted and raped the complainant on diverse occasions. This petition was allowed to be read as whole :

*Held, per curiam (Jach, J. contra)*, that the trial was vitiated by the admission in evidence of R's complaint in the case under section 372 Indian Penal Code and by the omission to warn the jury not to be influenced by the allegations therein against the accused.

The allegations in the petition of R were such as must have influenced the jury against the petitioner at the very beginning of the trial.

*Per Rankin, C. J. (Sukrawardy and Mukerji, JJ. concurring)*: That the petition of complaint of R was a document which the prosecution were entitled to put in but the whole of it should not have been read to the jury.

Though the jury should know that the proceedings before the Magistrate were proceedings upon the charge of selling a minor girl for immoral purposes, the other allegations had, *prima facie*, no bearing upon the question whether the certificate of birth was forged or not and if so, whether this was known to P.

That the counsel for the prosecution should not have been allowed to read to the jury the entirety of R's petition of complaint dated the 19th March, 1927 and that procedure adopted by the prosecution was wholly wrong and unjustifiable inasmuch as the petition of complaint was not tendered in evidence and consequently the petitioner was deprived of the opportunity of cross-examining R on the statement made by her in the said petition of complaint and of removing from the minds of the jury the unfavourable impression that must have been created by the reading of the petition of complaint.

*Per C. C. Ghose, J.*: If the sole object of the prosecution in placing the petition of complaint of R before the jury was to draw attention to the

**Misdirection—(Contd.)**

fact that she had stated therein that she was 14 years of age, it was a grave error on the part of the counsel for the prosecution to read out to the jury the entirety of the petition of complaint. It was a procedure which should never have been allowed.

*Per Ramlin C. J. : (Sukrawardy and Mukerji JJ. concurring).* That the introduction of the notice of the jury at the beginning of the case of all these highly prejudicial matters was unnecessary and unfair to the accused and was highly calculated to complicate the issues. The course adopted by the counsel for the prosecution threw upon the Judge, at the very commencement of the case, the necessity of coming to a decision immediately and in advances of the evidence.

*Per Jack J. :* As the Magistrate endorsed on the complaint produced at the trial that R stated its contents on oath, under section 80 of the Evidence Act, the Court should presume it to be genuine and under section 4 of that Act, the Court should presume it to be proved unless and until it was disproved. It was admitted under section 9 of the Evidence Act to show that there was such a case under section 372 Indian Penal Code. The allegations in the complaint, bad as they were, did not add, in reality, very greatly to the charge that he had sold her, a girl under 18, for purposes of prostitution—a charge which necessarily had to go to the jury being the charge at the trial of which forged certificate was used.

A criminal case had been started in Benares against Ram and others for having kidnapped R in August, 1926. In that case, the grandmother of R named S, gave evidence and P acted as an interpreter in that case. It was alleged that S in her deposition in that case had stated that R was 15 or 16 years of age. Prosecution counsel recalled and asked R about the said statement for the purpose of proving that the statement was made and P knew of it :

*Held, per Ramlin, C. J. (Sukrawardy and Mukerji JJ. concurring),* that S's evidence in the Benares case was not admissible in evidence in this trial and was not legally admitted.

*Per C. C. Ghose, J. :* Having regard to section 80 of the Evidence Act, the document which purported to be a record or memorandum of the evidence of S in the Benares case, was admissible in evidence without formal proof, if the identity of the deponent S was established on the evidence of R.

That the effect of the evidence of S against the petitioner was so slight that the jury ought to have been properly cautioned.

*Per Jack, J. :* S's statement being that of a witness in a judicial proceeding purporting to be signed by the Magistrate and produced before the Court, should be taken to be proved under section 80 of the Evidence Act. R's evidence as to the statements of S was only necessary to show that it was this particular occasion to which R was referring and her evidence was not admissible to prove what statements were made.

The learned Judge referred in the course of his charge to the jury to the

**Misdirection—(Contd.)**

evidence of S in the following words :—"Some evidence has been adduced to show that P knew perfectly well that the girl was under 18. That is not very material ; but if he knew that she was under 18 that would be an additional reason for supposing that he knew the document to be forged. The evidence of S, who gave evidence in Benares that the girl was at that time 15 has been put in, and some other statements of R about her age, one of which deals with a statement she made in a petition, not on oath, in which she said she was 14. We are not concerned as to whether R stated her age correctly or what her age was. If, on that evidence you are of opinion that P must have known that she was under 18, that would be a reason for concluding, that he knew the document was forged" :

*Held, per Rankin C. J. (Sukrawardy and Mukerji J.J. concurring),* that this charge amounted to a misdirection.

*Per C. C. Ghose, J. :* That the learned Judge should have told the jury that the petition of complaint had not been admitted as evidence in the case, that the contents thereof, which were objected to, were irrelevant to the matter in issue at the trial before the jury and that the jury were not to pay any attention whatsoever to the contents of that petition. This was non-direction and it was non-direction of such a character as to amount to misdirection.

*Per Rankin C. J. (Sukrawardy and Mukerji, J.J. concurring),* that, although the jury had before them the fact that the Magistrate had acquitted P, unless, however, some caution was given to the jury, this circumstance by itself would not necessarily efface from their minds the impression created by the accusations which they had heard.

The sole purpose of the forgery was to defeat the charge under section 373 I. P. C. and the jury had to consider whether in all the circumstances of the case, it was safe and reasonable inference to hold that the document had not been forged in the interests of P without P being well aware of what was being done in his interest.

That the question was entirely for the jury who had to make up their mind whether it was proved that P when he used the document was aware that it had been altered.

*Per C. C. Ghose, J. :* The question arising on the evidence of S, whether P knew that R was under 18, should not have been left to the jury in the words which the learned Judge seem fit to use and it would have been advisable if the jury had been told that it was a matter for them to find out on the entire evidence on record whether there was any justification for the theory that P knew that R was under 18, seeing that the prosecution did not adduce any substantive evidence on the point.

- It was not open to the jury to conclude that P knew that R was under 18 years of age.

Although the charge was to be taken as a whole, there was no neutralising expression in the charge.

*Per Jack J. :* As regards the omission in the charge of a caution to the



**Misdirection—(Contd.)**

jurors not to allow their minds to be influenced by the allegations in the petition against P's character, no great weight could be attached to this omission, as at the time the petition was admitted, it was expressly stated by the learned Judge and by the advocate for the Crown that the petition was put in merely to prove that there was a complaint under section 372 I. P. C. by R, and the jury were told not to allow themselves to be prejudiced by the allegations against the accused contained therein, as also the counsel for defence warned the jury not to let their minds be influenced by these allegations. The counsel for the prisoner should have directed the attention of the Judge to the omission.

The fact that P had reason to know the girl to be below 18 was relevant under section 11 of the Evidence Act.

The passage in the charge referred to when taken with the remainder of the charge, was not a misdirection.

The admission of S's statement in evidence could in no way have affected the decision of the case. **Padam Prasad Upadhyaya v. King-Emperor** ... .. 106

**Mohunt—Appointing another, as Mohunt—Appointee relinquishing his office—Original Mohunt resuming his office—Original Mohunt appointing another as successor—Appointment, if valid—Delegation to act during absence by deed—Deed, construction of.**

In March, 1917, G, a Mohunt, purported to appoint as Mohunt one N, and on 21st November 1917, by a formal deed N purported to relinquish his office. He expressed his intention of retiring from the disciples and leading the life of an ordinary householder. G then took his place again as Mohunt.

In August, 1918, G, as Mohunt, appointed as his successor the present plaintiff, one S, but in October, 1918, the latter executed a document which ran as follows: "I am not conversant with the customs and have no insight into the management of the *Ulagu* appertaining to the *guddi*, and there may be ill consequences to the Matt. On account of the affairs of the *guddi*, I cannot prosecute my studies well. It is also my intention that I should sever my connections with it and pass my days for sometime outstation and prosecute my studies and acquire the qualifications of a *guddinashin* Mohunt. Therefore I return to my *Guru Swami* G all the powers which I had acquired under the document dated the 3rd August, 1918 for good management of the *guddi* and the *Ulagu* appertaining thereto. My *Guru Swami* G shall have right (*hag*) to exercise at present and also in future all the powers which he used to exercise before as Mohunt *guddinashin*. I shall have no objection till I acquire full literary qualifications and the qualifications to make management and those of a *faqir* (ascetic) as required for the *guddi*."

In September, 1919, G, in the absence of S, the respondent, who was still pursuing his studies abroad, appointed the defendant appellant B as Mohunt.

**Mohunt—(Contd.)**

It was contended that on the appointment of N as Mohunt, G's functions to appoint anybody had ceased :

*Held*, that this point was not open to the appellant to raise before their Lordships as it was not made in the Court below, as no issue was directed in respect of it and as it depended or might depend, very largely upon questions of fact, upon the nature of the custom of the Matt, and upon the conduct of the disciples of G, N and every body else after the deed.

Their Lordships, at present were of opinion that the deed of 1917 was effective to transfer to G the Mohuntship and the property and that N in executing it meant, before he resigned, to transfer the spiritual rights and the temporal rights to G, and effectively did so.

*Held further*, that S was validly appointed.

That by the deed of October, 1918, S desired to remain Mohunt, that he was absenting himself for a time and that he was for the time appointing a delegate to act for him in his duties during his absence. **Mohunt Basdeva Nand GIr v. Mohunt Shantanand GIr** ... .. 513

— appointed, renunciation by, effect of—Original Mohunt appointing his successor ; *see* Mohunt ... .. 513

—, original, after the renunciation of the successor appointed by him, if can appoint another ; *see* Mohunt ... .. 513

**Mortgage, suit—Party—Setting up a prior title ; see Limitation** ... 152

**Mortgagee** advancing substantial sums on mortgage on the terms that he would manage the business for a term of years and recoup himself out of the profits—Duty—Transfer of Property Act, Sec. 76—Legal duties of Managing Agents ; *see* Winding-up ... .. 561

—, if entitled to add Government revenue paid by him, in ascertaining total sum due on mortgage ; *see* Deposit ... .. 502

—, prior, bringing a suit on his mortgage without impleading puisne mortgagee—Sale, what passes ; *see* Limitation ... .. 152

—, puisne, purchasing mortgaged property in execution of his mortgage decree, if can institute a suit for redemption ; *see* Limitation ... 152

—, transference from, when entitled to protection of Art. 134 Sch. I of the Limitation Act ; *see* Limitation ... .. 74

**Muhammadan Law—Dower debt—Charge upon property—Decree in dower suit creating a charge.**

A Muhammadan widow claiming dower *simpliciter* from her deceased husband's estate is in no better position than any ordinary unsecured creditor, and therefore (in the absence of a specific charge upon the property of the deceased), a *bona fide* purchaser for value from the heir of the deceased husband gets an unassailable title to the property.

*Held*, on the proper construction of the decree passed in the suit instituted by the widow for recovery of her dower, that the effect of the decree was to create a charge in favour of the plaintiff in respect of her dower debt upon the properties of her husband, and accordingly, the respondents,

**Muhammadan Law—(Contd.).**

having bought with notice of such decree, their purchase was subject to the charge. *Salyid Qasim Husain v. Habibur Rahman* ...

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*Marriage—Continuous cohabitation—Acknowledgment—Presumption of marriage and legitimacy—Rebuttal of—Onus probandi.*

Where a child has been born to a father, of a mother where there has not been a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan Law, the presumption is in favour of such marriage having taken place.

The law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years.

The legal presumption in favour of marriage is not weakened by evidence to the effect that there was a clan proclivity towards concubinage rather than marriage, nor by evidence that the woman was not a *pardahaskin* lady. It is no part of the law of India that to have lived and to remain behind the *pardah* is a necessary part of a lady's legal marriage or a conclusive evidential fact.

In all cases in which marriage may be presumed by cohabitation, combined with other circumstances for the purpose of conferring upon the woman the status of a wife, it may also be presumed for the purpose of establishing paternity. If a man has acknowledged another as his legitimate child such acknowledgment raises a presumption both in favour of the marriage and of the legitimacy. The presumption is, of course, rebuttable, by proof either that the mother of the acknowledgee could not possibly have been the lawful wife of the acknowledger at any time when the acknowledgee could have been begotten, or that there was no such marriage in fact. Once the claimant son establishes a good acknowledgment of legitimacy in his favour, the marriage will be held proved and the onus rests on those who deny a marriage to negative it in fact. Wilson's Digest of Anglo-Muhammadan Law, sections 84 and 85 and *Habibur Rahman Chowdhury v. Altaf Ali Chowdhury* referred to. *Mohabbat Ali Khan v. Muhammad Ibrahim Khan* ...

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**Murder or manslaughter—Medical evidence to be given *visu voce* by doctor; see Jury, verdict of** ...

1

**Non-direction amounting to misdirection; see Misdirection** ...

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**Non-occupancy riyat - Bengal Tenancy Act (VIII of 1885), Secs. 43, 46—Decree of Court determining fair and equitable rent—Agreement to pay enhanced rent pending appeal—Dismissal of the appeal—Liability to pay enhanced rent, when accrues.**

The liability of a non-occupancy riyat to pay enhanced rent is not dependent on the decree of the Court which merely stops short after determining what the fair and equitable rent is. His liability really attaches from the date when the tenant agrees to pay the rent so determined within the meaning of section 46 Cl. (7) of the Bengal Tenancy

**Non-occupancy riyat—(Contd.).**

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| terminable when the Act came into force and converted into a permanent               |     |
| right of occupancy by section 6. It contemplates that as an incident of              |     |
| the terminable possession rights with respect to the trees or the holding            |     |
| might have been reserved to the landholder either by custom or by con-               |     |
| tract. It provides that where the reservation is by custom, it, so far as            |     |
| existing trees are concerned, is to remain effective throughout the whole            |     |
| of the occupancy, by the Act made permanent. In places where the                     |     |
| custom obtains such reservation is conventional without being expressly              |     |
| made, in contra-distinction to places where no such custom exists—as,                |     |
| for example, in the <i>samindari</i> of North Vellore, in which case the reser-      |     |

**Patta—(Contd.).**

vation, if it is to be operative, must be expressed as part of the contract. But in each case the reservation, when not qualified, will be operative for precisely the same period of time and no longer—that is to say, until, on the expiry of the right to possession by the tenant, the holding reverts to the *zemindar*. Accordingly, the section makes no distinction in the result between a reservation made by custom and one made by contract. Where the reservation, however constituted, is contemporaneous with the previously limited possession, it remains, except with regard to trees subsequently planted by the *ryots* or naturally grown upon the holding, operative throughout the occupancy made permanent by the Act. The landholder cannot claim an enhancement of rent or any additional payment for his lost trees.

On the 6th June, 1901, the appellant Raja granted to the father of the respondents, for a term of 10 years expiring Fasli, 1320, a lease of some 1363 acres of land in the village of N. Prior to this lease in his favour, the lessee had no occupancy or other rights in the holding. Of the acres comprised some 843 were entered as being in cultivation, and 520 as being dry pasture waste. The annual rental for the whole was fixed at Rs. 1784-13 as. representing, so far as the 'cultivation' lands were concerned, a rent of as. 14-2 per acre, and for the 'dry pasture waste' a rent of 8 annas per acre. The lease, however, contained a provision, that if the lessee raised dry cultivation on the dry pasture waste he had to pay as much upon the land so cultivated at the higher rate of as. 14-2 per acre as well as the expenses. By the lease the Raja reserved to himself full rights in regard to 8000 palmyras and date palms fit for tapping. The lessee was "not in the least to be entitled to them," as the list of all the trees standing on the lands was not included in the rent reserved, the lessee was not to raise any objection whatever to the *zemindar* dealing with the same.

After Fasli 1320, the Raja tendered to the respondents for the year 1912 a *pattah* in respect of such part of the original holding as he conceived himself bound to include in it. On the refusal of the respondents to accept the *pattah* tendered and to execute a proper *muckabba* this suit was, under section 56 of the Madras Estates Act, 1908, brought by the Raja to enforce his right :

*Held*, that the *zemindar* was entitled to continue to reserve the right by the *pattah*, limited to the trees which existed before the Madras Estates Act and not extending to any which might have been planted by the respondents or might naturally have grown upon the holding since its passing.

That of the 520 acres, 223 acres being tank-bed land, should be excluded from the *Pattah* and the remaining 297 acres should be included as being "cultivable" land, although it had never in fact been cultivated. Sri Rajah Bommadevaru Naganna Naidu Bahadur v. Velamanchilli Pitchayya

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| <b>Plaint</b> — <i>Ambiguous</i> — <i>Defendant</i> , duty of.                                                                                      |       |

The plaintiff was zemindar of Mouza Chur Daiya and the adjoining Mouza Daiya. In Mouza Chur Daiya there were four Howlas, of which three belonged to the defendants appellants and the fourth to the plaintiff. The plaintiff acquired by auction purchase the *taluk* of Adinath Roy. This *taluk*, according to the plaintiff's case, comprised lands both in Mouza Daiya and in Mouza Chur Daiya, but it was not proved that any part of the lands of the *taluk* were situated within Mouza Chur Daiya. Recently the disputed lands, which were within the Mouza Chur Daiya, were reformed and were taken possession of by the defendants. In a suit for recovery of possession, the plaintiff stated his title as zemindar and alleged that his zemindary included the Mouza Chur Daiya. The plaintiff further alleged that no right could accrue to the defendants in respect of the disputed lands and that the disputed land was the *khas* land appertaining to the plaintiff's *taluk* included in their zemindary. The plaintiff succeeded in his suit. The defendants contended that the only case raised by the plaintiff in his plaint was one based upon his ownership of the *taluk*, and that therefore he was not entitled to succeed in his zemindary title if he failed to establish his *taluki* title:

*Held*, that the plaint was intended to raise the case of zemindary title, as well as that of *taluki* title.

Even if, however, the plaint be regarded as ambiguous, all doubt as to its meaning was set at rest when the matter came before the primary Court.

Before it the case of zemindary title was raised, and from that time onward that aspect of the case was kept well to the front. If the defen-

**plaint—(Contd.)**

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| dants were originally misled by the language of the plaint and desired an opportunity of calling further evidence directed to the case of zemindary title, it was their duty to make their application at the earliest possible moment. <i>Guanendra Kumar Roy Chowdhury v. Prafulla Nath Thakur</i> ... .. | 509 |
| —, ambiguous—Defendant misled—Defendant, duty of; <i>see</i> Plaint ...                                                                                                                                                                                                                                     | 509 |
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| <b>Pre-emption</b> — <i>Property divided in blocks—Purchase of one block—Refusal to purchase other blocks—Waiver—Village community—Notice—Oudh Laws Act, (XVIII of 1876), Sec. 11—Acquiescence.</i>                                                                                                         |     |

The owner, being desirous of disposing of certain property, divided it into a number of blocks and offered them for sale. The blocks were clearly delineated upon separate plans, and separate *khassras* and *jamabandis* were prepared for each. Block No. 19 was purchased by the appellant, the Raja of Basti; blocks Nos. 7 and 9 by Dargahi (now deceased and represented by Sita Ram and Madho, respondents in Appeals Nos. 29 and 30) and Mata Prasad (respondent in Appeals Nos. 29 and 30); and blocks Nos. 10-13, 15 and 20 by Raja Mohammad Mumtas Ali, the respondent in Appeal No. 31. The appellant had procured a list of all the blocks, containing the prices, but he definitely refused to purchase any but block No. 19 which was adjacent to his own estate. The conveyance of block No. 19 to the appellant was executed and registered on the 9th June, 1924; the conveyance of block No. 7 to respondents in Nos. 29 and 30 was executed on the same day, but at a later hour. The oral agreement for sale with the respondent in Appeal No. 31 was entered into some time prior to the agreement with the appellant but when the latter refused to purchase any of the other blocks he was aware of that agreement and acquiesced in it. The sale to respondent in Appeal No. 31 was completed on the 18th June, 1924 and the second sale to the respondents in Appeals Nos. 29 and 30 on the 21st July following. The appellant claimed to pre-empt the other blocks;

*Held*, assuming that the prior completed purchase by the appellant, under other circumstances, had given him the right of pre-emption in respect of other blocks, he had by his conduct, waived this right and could not re-assert it.

It was contended for the appellant that, upon the death of the original

**Pre-emption—(Contd.)**

owner of the property, the ten persons who were the devisees became a village community within the meaning of section 7 of the Oudh Act, and that as soon as the appellant purchased block No. 19 he became a member of that community.

*Held*, that the owner's devisees merely by reason of an interest in the land so acquired, did not constitute a village community which was not shown to exist apart from themselves.

Their Lordships were not prepared in the present case to affirm the correctness of the proposition that only persons having an interest in the village lands should be deemed to be members of the community.

Their Lordships did not think it necessary to decide in this appeal as to the possible competition between the rights acquired by a contract for sale and those attaching under the Oudh Act to a completed conveyance. Their Lordships said "It may be that in such a case there is a direct conflict between the statutory rights attached under Chapter III of the Transfer of Property Act to an agreement for sale, and the right of pre-emption conferred by the Oudh Laws Act."

No formal notice of the proposal to sell any of the plots in suit was given by the seller :

*Held*, that the appellant's refusal to purchase any of the other plots and his acquiescence in the sale to the respondent in Appeal No. 31 might have induced the seller to believe that the statutory notice was unnecessary, and if it had been given it would seem that the present suit would have been barred by section 11 of the Oudh Laws Act. **Raja Patowari Partab Narsain Singh v. Situ Ram** ... ..

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**Prejudice—Charge framed for substantive offence—Conviction for abetment—No order for conviction under Sec. 120B, Indian Penal Code (Act XLV of 1860)—Criminal Procedure Code (Act V of 1898), Sec. 237.**

*Per Sukrawardy, J* : It cannot be definitely said that a person having been charged with a substantive offence cannot be convicted for abetment thereof. Every case depends upon its own facts and if the facts justify the conviction for abetment, though the person was charged with the commission of the offence itself, there is no bar in law to such conviction.

*Per Jach, J* : Whether a man can be convicted without a separate charge on a charge of abetment of the principal offence depends upon the circumstances of the case. But it can only be done if the circumstances being the case under section 237 of the Code of Criminal Procedure.

Where a petitioner was charged under section 120B of the Indian Penal Code and was clearly guilty under that section but no conviction was made by the lower Court :

*Held (per Sukrawardy, J)* : that, the High Court could alter the finding and convict the accused.

*Per Jach, J* : That as the accused was not prejudiced by the procedure adopted, there was no necessity for interference. **Jnanda Charan Ghatak v. Emperor** ... ..

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**rejudice**—*Reasons for dismissal of appeal, if to be given—Charge under section 379 Indian Penal Code (Act XLV of 1860) but conviction under section 426.*

No reasons need be recorded in support of summary dismissal of an appeal.

Where the Magistrate found that the *Kalai* that was cut and taken away, was unripe, a conviction under section 426 of the Indian Penal Code was not illegal though the accused were charged under section 379.

**Kalachand Ghose v. Tatu (Tahir) Shaik** ...

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—, topics of, connected with the character of the prisoner to be carefully excluded in the opening by the counsel for the prosecution; *see*

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—decree, effect of setting aside, on final decree; *see* **Appeal, if competent** ...

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**Presidency Magistrate**, procedure to be observed by, after the order for quashing the commitment by the Judge of the High Court in Session; *see* High Court, jurisdiction of ...

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—Magistrate, when can make a reference to High Court—Criminal Procedure Code, Sec. 432; *see* High Court, jurisdiction of ...

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**Presumption**—Grantor parting with all his rights (including underground rights or minerals) in favour of grantee; *see* **Second appeal** ...

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—Man acknowledging another as his legitimate child; *see* **Muhammadian Law** ...

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—Marriage—Legitimacy—Continuous cohabitation; *see* **Muhammadian Law** ...

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—as to legitimacy—Marriage presumed by cohabitation combined with other circumstances; *see* **Muhammadian Law** ...

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—of marriage, if rebutted—Clan proclivity towards concubinage—Woman, not a *furdanashin* lady; *see* **Muhammadian Law** ...

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—of marriage and legitimacy, when arises; *see* **Muhammadian Law** ...

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—of offer—Notification of party of his insolvency; *see* **Specific performance** ...

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**Primogeniture**—Custom—Military tenure, if its nature is altered by taking settlement from Government—Aboriginal tribe—Adoption of Hindu law.

It is a question of fact whether certain people, assuming their origin to be aboriginal, have adopted the Hindu Law as a whole in matters of succession.

Where a custom was originated in a family for certain reasons, it cannot be said that those reasons being non-existent, the custom itself should

**Primogeniture—(Contd.)**

cease to exist. In such a case the principle embodied in the expression *cessante ratione cessat lex* does not apply. But it is quite different where the claim is made on the basis of the nature of the tenure. When the nature of the tenure is altered, the rule of succession is altered.

Assuming that the Mochpara zemindari was military tenure at the commencement as soon as the zemindar took the Permanent Settlement, the nature of the tenure was altered and he became an ordinary zemindar subject to the general law of succession. If there was a family custom of primogeniture, that custom could not have been wiped out by the fact that the zemindar took a new settlement from the Government.

The custom of primogeniture may be lost by acts of parties. *Narendran Narayan Chowdhury v. Nagendra Narayan Chowdhury* ...

**Prior Mortgagee** bringing a suit on his mortgage without impleading puisne mortgagee—Sale, what passes; *see* Limitation ...

— Mortgagee not making subsequent mortgagee party to his suit on mortgage, effect of—Decree or sale—Puisne mortgagee's right to redeem; *see* Limitation ...

**Privy Council**; non-interference by—Question of mere valuation—Acquisition of land under the Land Acquisition Act; *see* Compensation ...

—, practice of; *see* Concurrent findings of fact ...

**Proceedings** under section 145, Criminal Procedure Code, if can be instituted by Subordinate Magistrate on the direction of the District Magistrate; *see* Dispute concerning land ...

**Profit of business**—Company dealing in house property by letting out for premium and rent—Position bettered by means not directly connected with the business of the Company—Enhanced value realised; *see* Income tax ...

— of business—Letting out of property upon lease for *salami* and for rent—Forfeiture clause—Exaction of fresh *salami* and increased rent; *see* Income tax ...

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—, opening of—Doubtful questions of admissibility; *see* Misdirection ...

—, opening of, what to contain; *see* Misdirection ...

**Puisne mortgagee** purchasing mortgaged property in execution of his mortgage decree, if can institute a suit for redemption; *see* Limitation ...

— mortgagee's right to redeem—Puisne mortgagee not made a party by prior mortgagee in his suit; *see* Limitation ...

**Purchaser, real**, when can show the real nature of the transaction—Suit by certified auction-purchaser against real owner for possession; *see* *Benami* transactions ...

**Question of fact**—Person, originally aboriginal, if adopted the Hindu Law as a whole in matters of succession; *see* Primogeniture ...

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| 'Quicquid plantatur solo, solo cedit' if applicable in India ; <i>see</i> Compensation ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 45    |
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| Rating— <i>Principle—Bengal Municipal Act (III B. C. of 1884), Secs. 85(b), 101—Proviso—Construction of section of an Act—Assessment ultra vires and illegal—Jurisdiction of Civil Court.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |       |
| If the assessment as made be <i>ultra vires</i> and illegal, it cannot be sustained, and the plaintiff is entitled to a declaration to that effect.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |       |
| The meaning and effect of sections 85(b) and 101 of the Bengal Municipal Act are clear and in accordance with the general principles of rating, and those sections provide that in every case the rate is to be imposed on the annual value of the holding which is deemed to be gross annual rent at which the holding "may be reasonably expected to let," while the proviso is inserted in aid of the assessor, and to lay down a maxim to prevent excessive assessments being made.                                                                                                                                                                                                                                                                                                                                                                                                       |       |
| Where no attempt was made to ascertain the value of the holding as provided by section 101 of the Bengal Municipal Act, the Commissioners were acting <i>ultra vires</i> in accepting the Valuation Officer's method of valuation "based, as they knew it was, upon a percentage of the estimated cost of the buildings in entire disregard of the principle which they were bound by law to adopt as the basis of their assessment."                                                                                                                                                                                                                                                                                                                                                                                                                                                         |       |
| "The principle of rating upon which the Commissioners are directed to proceed is the same as that which is adopted in England, and similar difficulties arise there in the case of gentleman's parks and mansions which are laid out for residential purposes, and not for letting. But such properties are, nevertheless, constantly rated upon the basis of their annual letting value."                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |       |
| No words are to be read into any enactment which are not to be found there and which would alter its operative effect because of provisions to be found in any proviso. A proviso may be used to guide one in the selection of one or other of two possible constructions of the words to be found in the enactment, and shew when there is doubt about its scope, when it may reasonably admit of doubts as to its having this scope or that, what is the proper view to take of it ; but to find in it an enacting provision which enables something to be done which is not to be found in the enactment itself on any reasonable construction of it, simply because otherwise the proviso would be meaningless and senseless and would be in the highest degree dangerous. <i>Narayan Chandra Dutt v. The Chairman of the Municipal Commissioners of the Panchhat Municipality</i> ... .. |       |
| Receiver, if can be appointed—Decree against Nawab of Murshidabad ; <i>see</i> Decree, execution of ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 537   |
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| Reference— <i>Criminal Procedure Code (Act V of 1898), Sec. 307—High Court, what to consider—High Court, when interferes with the verdict of the jury—Confession, retracted, if can be given effect to—Confession promptly withdrawn—Criminal Procedure Code, Sec. 103, object of—Police officer making the search, called as a witness—Respectable inhabitant.</i>                                                                                                                                                                                                                                                                                                      |       |
| Under section 307 of the Code of Criminal Procedure, the High Court has to consider the entire evidence, and to decide after giving due weight to the opinion of the Sessions Judge and the jury, whether the charge was made out against the accused, and whether the verdict was right or not. It is not the practice of the High Court to interfere with the verdict of a jury unless it is shown that the verdict was manifestly wrong and that there were no sufficient materials to justify it.                                                                                                                                                                    |       |
| There is nothing to prevent a confession although retracted, from being given effect to as against the maker. But where the confession has been retracted, the general rule is that independent corroboration of the confession should be required in order that the Court may be satisfied that the confession is true.                                                                                                                                                                                                                                                                                                                                                 |       |
| In view of the fact that confession was promptly withdrawn when the accused came before the Committing Magistrate, it will not altogether be safe to rely entirely upon it in the absence of any independent evidence to corroborate it.                                                                                                                                                                                                                                                                                                                                                                                                                                 |       |
| The object of section 103 of the Code of Criminal Procedure is presumably to obtain as reliable evidence as possible of the search, and to exclude the possibility of any concoction, or malpractice of any kind.                                                                                                                                                                                                                                                                                                                                                                                                                                                        |       |
| There can be no harm in the Police officer, who made the search, being called as a witness at the trial, but an officer who is connected with the investigation cannot be deemed to be an entirely satisfactory witness for the purpose of proving the search. It is incumbent upon the Police, at any rate, to make some attempt to comply with the provisions of section 103 of the Code of Criminal Procedure. It is possible that there were no persons living near the place of occurrence who would fulfil the definition of respectable inhabitants used in the section. In that case some evidence to that effect should be given. <i>Emperor v. Balal Ghose</i> | 518   |
| — to High Court, when can be made by Presidency Magistrate— <i>Criminal Procedure Code, Sec. 432; see High Court, jurisdiction of</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 408   |
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**Registration—(Contd.)**

—*Equitable charge upon immoveable property—Compulsory registration—Effect of non-registration.*

A document creating an equitable charge upon immoveable property comes within the purview of section 17 (1) (b) of the Indian Registration Act, 1908, as creating a right, title or interest over immoveable property, and is, therefore, compulsorily registrable, and if not registered, no charge can in law be created by it, (vide section 49 of the Act). *Khoo Sain*

*Ban v. Tan Guat Tean* ... .. 99

**Registration Act, Secs. 17, 49—Sale—Agreement to execute a registered sale deed—Sale deed not registered, if admissible in evidence in a suit for**

specific performance of agreement; *see* Specific performance ... 487

—, Secs. 17 (1) (b), 49—Equitable charge upon immoveable property—Effect of non-registration; *see* Registration ... 96

**Regulation VII of 1822, settlement under, intention of—Effect of actual possession; *see* Settlement** ... 354

**Romand—Indian Income Tax Act (XI of 1922), Sec. 66 (4)—Partners of two firms—Same persons in same shares—Intention.**

Under section 66 Cl. (4) of the Income Tax Act, the High Court sent back the case to the Commissioner for making clear the points upon which further findings are required at his hands.

The proposition that the same persons in the same shares cannot for income tax purposes be partners of two entirely separate firms is a highly abstract proposition.

There may be an entirely different firm. It may be composed of the same partners and it may be that the partners are interested in the same shares but as a matter of intention of the parties, an entirely different partnership. *In Re Messrs. Martin & Co.* ... 300

**Renunciation by appointee Mohunt, effect of—Original Mohunt appointing his successors; *see* Mohunt** ... 513

**Reservation contemporaneous with previously limited possession—Trees—Landlord, if can claim enhancement of rent or any additional payment for his lost trees; *see* Patta** ... 493

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**Reversioner, suit by, for possession after the death of female heir—Female heir out of possession for more than 12 years; *see* Limitation** ... 260

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**Revising Court, if can order a further enquiry on the same materials; *see* Further enquiry** ... 234

**Revision—Enhancement of sentence—Application by complainant—Inadequacy of sentence.**

*Per Buckland, and Graham JJ.* In a case where there is manifestly a ground for interference beyond all reasonable doubt, it matters not

**Revision—(Contd.)**

whether the case comes before the High Court of its own motion or at the instance of a private prosecutor or through any other channel whatever. In such a case the High Court will interfere.

*Per Mukerji, J* : Where an accused was convicted on his plea of guilty, an application by the complainant for enhancement of sentence unless backed by the Crown, is not entertainable.

*Per Buckland, J* : An application for enhancement of sentence should not be encouraged at the instance of a complainant or private prosecutor unless it is clear beyond all question that it should be allowed.

*Per Mukerji J* : A sentence cannot be enhanced unless there has been a regular trial of the case in spite of the accused's plea of guilty. All

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**Second appeal—Civil Procedure Code (Act V of 1908), Secs. 100, 101—Erroneous finding of fact by the first appellate Court—Interference in second appeal when justifiable—Specific Relief Act (I of 1877), Secs. 12, 21—"Explanation" to section 12—Compensation in money, when an adequate relief for breach of contract to transfer immoveable property—Refusal to pass decree for specific performance—Presumption created by S. 12, "Explanation."**

Having regard to the provisions of the Civil Procedure Code, 1908, sections 100 and 101, there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.

Where therefore, the first appellate Court comes to a clear finding of fact, and there was evidence on which it could properly arrive at such finding, it is not open to the High Court in second appeal to interfere with the finding of fact thus arrived at.

In a suit for specific performance of a contract to transfer immoveable property, where the Court finds that compensation in money is an adequate relief to the plaintiff for the non-performance of the contract by the defendant, a decree for specific performance cannot be passed in the plaintiff's favour, [vide the express provisions of the Specific Relief Act, 1877, sections 12 (c) and 21 (a)].

The presumption created by the "Explanation" to section 12 of the

**Second appeal—(Contd.)**

Specific Relief Act, 1877, (namely, that "unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money"), is a rebuttable one, and is rebutted on proof that the breach of the contract could be adequately relieved by compensation in money.

**Ramji Patel v. Rao Kishore Singh** ... ..

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— *Civil Procedure Code (Act V of 1908), Secs. 100, 101—Non-interference with erroneous finding of fact—Indian grant, what passes under—Rules of English Real Property Law inapplicable—Underground rights or minerals do not prima facie pass to grantee, in absence of express evidence that they formed part of the grant.*

Under the Civil Procedure Code, 1908, no second appeal lies except on the grounds specified in section 100, (vide section 101 of the Code).

There is no jurisdiction to review or modify the finding of fact of the Judge of the first appellate Court, where there was evidence before the Judge upon which his finding of fact could have been based.

An erroneous finding of fact is a different thing altogether from an error or defect in procedure, [see sub-clause (c) of section 100, Civil Procedure Code, 1908] and there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be.

The rules of English Law as to real property in England afford no guidance as to what passes under an Indian grant. There is, accordingly, no presumption in India that in the absence of any evidence as to the terms of the grant the grantor parted with all his rights (including underground rights or minerals) in favour of the grantee. On the contrary, in the absence of any evidence that the underground rights were included in the grant they could not be treated as having thereby passed.

When a grant is made by a zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect. **Raja of Pittapur v. Collector of Godavari**

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**Second appeal**, If can be entertained on the ground of erroneous finding of fact, however gross or inexcusable the error may seem to be; see **Second appeal** ... ..

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— **Second appeal**, question raised in, for first time, requiring investigation of facts, If can be entertained; see **Settlement** ... ..

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— **Second appeal**, when lies; see **Second appeal** ... ..

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**Secondary Evidence** as to contents of a letter, if admissible in evidence—No objection raised as to the giving of evidence—Letter neither produced nor called for; see **Kidnapping** ... ..

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**Security—Suspected person—Criminal Procedure Code (Act V of 1898), Sec. 109—Attempt to conceal—Failing to give satisfactory evidence.**

Section 109 (a) refers to the case of a continuous act and not the case of an isolated effort of concealment.

The fact that the accused failed to give a satisfactory account of themselves

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| The intention of a settlement made under Regulation VII of 1822 is not to touch or disturb the possession of persons in actual possession of the lands but rather to respect such possession and the entries in the <i>khallans</i> prepared for the purposes of a settlement under the Regulation do not confer a title on the persons in whose favour such entries are made but only record the fact of their possession to serve as a basis for calculation of the revenue. |       |
| An application for substitution on the death of a party to a suit can be entertained under Order 22 R. 10 Civil Procedure Code, if no final order has been made in the suit and no question of limitation arises in such a case.                                                                                                                                                                                                                                               |       |
| A question which is raised for the first time in second appeal and which involves the investigation into certain questions of fact, cannot be entertained at such a late stage. <b>Kader Bux Patwari v. Sallmuddi Hazi</b> ... ..                                                                                                                                                                                                                                              | 543   |
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| <b>Specific performance—Agreement to execute a registered sale deed—Sale deed not registered—Registration Act (XVI of 1908), Secs. 17, 49.</b>                                                                                                                                                                                                                                                                                                                                 |       |
| If an instrument which comes within section 17 of the Registration Act as purporting to create by transfer an interest in immovable property is not registered, it cannot be used in any legal proceedings to bring about indirectly the effect which it would have had if registered. It is not to                                                                                                                                                                            |       |



## Specific performance—(Contd.)

'affect' the property, and it is not to be received as evidence of any transaction 'affecting' the property. An agreement for the sale of immovable property is a transaction 'affecting' the property.

As the document in the present case clearly purports to transfer A's interest in the immovable properties which he had inherited from B, it comes within the terms of section 17 of the Registration Act and requires registration. It being unregistered, is not admissible in evidence in a suit for specific performance of the agreement that the vendor shall, if the vendee so requires, execute a registered sale deed. **James R. R.**

• **Skinner v. Robert Hercules Skinner** ... ..

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Contract by correspondence—Complete contract—

*Terms in a correspondence—Question of law—Consent of parties—Company going into liquidation, effect of—Same rules apply as in bankruptcy—Contract subsisting—Contract, if rescinded—Notification by party of his insolvency—Trustee in bankruptcy—Specific performance of contract by bankrupt to buy a property—Different rule in contract to sell property—Trespass to land—Proper plaintiff in ejectment suit—Mere right to property without right to possession—One co sharer, if can bring an action in trespass—Co-owners of mining parties—Right of conveyance—Co-owner's right to work the mine—Civil Procedure—Code (Act V of 1908), O. 1 R. 10, O. 22 R. 10—No assignment of devolution—Proceedings when commence, when a person is added as defendant under O. 1 R. 10 of the Code of Civil Procedure—Damages, measure of—Allowances.*

When it is sought to establish a contract by correspondence, the whole of the correspondence relating to the matter in question must be looked at for the purpose of finding out at what stage there was, if at all, a complete contract between the parties.

Where the cardinal points of a proposed contract are definitely agreed upon by letters, the mere fact that in the course of the correspondence, reference has been made to a more formal agreement or subsidiary non-essential stipulations, will not prevent the Court from considering the agreement arrived at by the letters as concluded.

If once a definite offer has been made and it has been accepted without qualification and it appears that the letters of offer and acceptance contain all the terms agreed on between the parties, the complete contract thus arrived at, cannot be affected by subsequent negotiation.

Where certain letters are stated as constituting the agreement, no testimony *alioquin* is admissible and subsequent letters cannot be referred to aid in construing the contract contained in the material letters.

The question whether the terms contained in a correspondence amount to a binding contract between the parties is one of law.

Even if there be a complete contract between the parties, such contract can be put an end to by the consent of the parties.

The effect of a Company going into liquidation while a contract entered into by the Company before liquidation is subsisting, is the same as when

**Specific performance—(Contd.)**

a party to a contract becomes bankrupt or insolvent. The bankruptcy or insolvency of a party may not alone necessarily result in such an incapacity to perform the contract as to entitle the other party at once to treat it as broken and to claim damages, as it may be for the benefit of the bankrupt or insolvent or of his estate to complete the contract and the representatives of his estate may be authorized to do so. Nor does bankruptcy or insolvency alone entitle the other party to rescind the contract; but a notification by a party of his insolvency may be taken as presumptively importing an offer to rescind which the other party may accept; and it would at least justify a refusal on his part to complete the contract unless the insolvent or his representatives should prove his ability and readiness to complete his part. If the bankrupt before bankruptcy has contracted to sell or mortgage, the trustee in bankruptcy takes it subject to an obligation to fulfil the contract. If, for instance, it is a contract to grant a lease, the trustee in bankruptcy may obtain specific performance of the contract if he agrees to be personally bound by the covenant. The contract, however, has got to be performed by the trustee in bankruptcy, if he chooses to perform it at all, within a reasonable time; and, if it is not performed within a reasonable time, the other contracting party may treat the contract as having been abandoned and other cases. The position, therefore, being that the trustees of a bankrupt may disclaim an onerous contract or may perform all that the bankrupt was neglecting to perform at the time when he was bound to perform them, and the bankruptcy having no other effect on the contract than to put the trustee in the place of the bankrupt neither rescinding the obligation on either side nor imposing new ones, nor anticipating the period of performance on either side, if the trustee does all that the bankrupt ought to have done, he may recover against the contracting party the damages which the bankrupt himself could have recovered if he had performed the contract; or if he omits to do so and neglects to perform the contract, he loses the benefit of the contract and the other party has his remedy against the bankrupt's estate. The law does not require that the trustee in bankruptcy should give express notice within a reasonable time after the date of the bankruptcy of his adoption of the contract. The law only requires the trustee in bankruptcy to perform the bankrupt's part of it as and when he should have done it himself.

Specific performance of a contract by a bankrupt to buy a property is not specially granted against the trustee in bankruptcy of a vendee without consent. Aliter in the case of a contract to sell property.

It is wrong to another's possession; it is an injury to a possessory and therefore the proper plaintiff in an action for trespass to land is the person who is in actual or constructive possession of the land, that is, the person who has immediate possession. The gist of the action of trespass is the wrong to the right of the plaintiff's possession. The possession is all important in an action for trespass; and a mere

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**Specific performance—(Contd.)**

right to property without a right to possession is not sufficient to support the action. Right to possession is one of the constituent elements of the complete right of property; a person with a right to possession can always maintain an action of trespass against a wrong-doer. So also in the case of a person in actual possession. Such a person has against a mere stranger or wrong-doer the same remedies as if he had the right to possession and he can as against the stranger maintain trespass and in general the stranger who violates his possession cannot justify the violation by showing that the possession was without title or even by showing that it was wrongful, unless he further proves not only that a third person was entitled to the possession but that he, the stranger, had acted with the authority of the said third person. The fact of possession in the sense referred to above therefore is *prima facie* evidence of title, and is alone sufficient to sustain the plaintiff's case against a mere wrong-doer.

A co sharer can by himself maintain an action of trespass against a wrong-doer.

The co-owners of mining parties have a right to convey without reference to other co-owners.

Each co-owner is entitled to work the mines provided he does not take more than his share of the minerals nor work the same wastefully. A person who is a co-owner of a mine with another or others, whether as joint tenant, tenant in common or co-parcener, can enter upon and work the mine or license another person to do so, subject only to the restriction that he shall not take more than his share.

O. 22 R. 10 of the Civil Procedure Code has no application where there was no assignment nor any contract in respect of which there can be an assignment, creation or devolution of any interest in party's favour.

The proceedings against a person added as defendant under O. 1 R. 10 commence from the date when he is so added.

The measure of damages in a case like the present is the fair market value of the coal at the pit mouth at the time when it was severed subject to just allowances. As to what allowances there shall be, depends on the conduct of the parties and the other circumstances of the case. There are two rules—(a) the harsher, under which only the cost of bringing the coal to bank is allowed and (b) the milder, under which the expense of hewage and haulage *i. e.*, the cost of working and severing as well as of bringing to bank is allowed. The harsher rule, only allowing the expense of bringing to bank, has been applied where the misconduct has been of a substantial character. The milder rule, allowing the deduction of the expense of working and severing the coal as well as of bringing it to bank, will be applied where the wrongful working has not been done with guilty or negligent mind, or sinister intention.

C, the plaintiff's allegation was, that he acquired certain coal lands in pursuance of an agreement with the defendant company (J. and Co.),

**Specific performance—(Contd.)**

whereby the latter agreed to pay him, the price of acquisitions of lands, the rents &c., payable by him to his lessor, to advance monies for further acquisition of lands, and to deposit a certain amount as earnest money with him; that he was induced to spend large sums of money to carry on 'testing' and 'winning' operations in the coal lands; that the defendant company were bound under their agreement to pay all these monies to him and to take a conveyance from him in respect of the lands acquired by him in terms of the agreement. This suit was instituted for specific performance of the said agreement, or, in the alternative, for damages in respect of the breach and in respect of the coal raised by the defendant company, who were given possession by the plaintiff, and also for damages for trespass. The appellants were the alleged transferees from the defendant company.

The defence admitted the agreement but denied its terms as alleged by the plaintiff. The defendant company, it was alleged, were all along willing to perform their part of the agreement on plaintiffs making out a good title to the lands acquired by him but he failed to make out such title:

*Held*, that even if there was a complete contract between the parties, neither party could ask for its specific performance, as the first contract had been put an end to by mutual consent and as the only subsisting contract had been abandoned by the defendant company long before the institution of suit.

That the plaintiff as a co-sharer-lessor could not eject the defendant company, and in lieu of ejectment would get damages on the basis of the value of the coal to the extent of his share in the property which had been worked by the defendant company, from which would be deducted the cost of working and severing the coal and bringing the same to the bank. *Currimbhoy and Company, Limited v. L. A. Creet* ... 212

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| <i>ficate Act, Sec. 214, construction of—Civil Procedure Code (Act V of</i>            |     |
| <i>1908), Sec. 115.</i>                                                                |     |

\* In granting succession certificate the District Judge should be satisfied not that a succession certificate will be necessary or exigible under section 214 of the Indian Succession Act or otherwise but that there is "ground for entertaining the application"; that is to say, that it is a serious and sensible application by a person who desires to make a claim in the representative character which he seeks. Clauses 2 and 3 of section 214 of the Indian Succession Act contemplate that the Judge should endeavour to determine whether the applicant is the proper person or a proper person to be clothed with a representative character and any intricate questions of fact or law bearing upon this question may be solved in a summary manner.

It is not the law that the Court upon an application for a certificate has to decide for itself, as a condition of granting the certificate, that the case is one in which the debt was due to the deceased person within the meaning of section 214 of the Indian Succession Act. A reasonable and sensible claim to be enabled to proceed against a third party as being a debtor of a deceased person is sufficient for the purpose of clothing the Court with jurisdiction under section 373 of the said Act and may be regarded as ground for entertaining the application.

A succession certificate enables the grantee to prosecute a claim as a representative of the deceased with greater advantage than he would have been able to do in the absence of this representative right.

The issue of a succession certificate may be justified without the Court arriving at a conclusion to the effect that such a certificate is a necessary condition without which the claim could not succeed, or that the debts were due to the deceased.

Section 214 of the Indian Succession Act being a restrictive section, should be carefully and accurately construed.

A certain property was acquired under the Land Acquisition Act after the death of the owner when it was in the hands of his widow. The compensation money was kept in deposit in the Land Acquisition Collector's office under section 31(s) of the Land Acquisition Act. After the death of the widow, three sons of one of two daughters of the owner petitioned the Land Acquisition Judge for payment to them of their share of the money. They were directed to obtain succession certificate for the withdrawal of the amount. They then applied to the Subordinate Judge

**Substitution—(Contd.).**

for succession certificate with reference to the share due to each in the compensation money. The son of the other daughter contended that the certificate could not be granted as the compensation money, if it were a debt, was not a debt due to the deceased. The applications were granted both by the primary Court and by the appellate Court. On revision :

*Held*, by the Full Bench, that the case was not one which could be interfered with under section 115 of the Civil Procedure Code, as the Subordinate Judge had jurisdiction to make the order.

That the opposition of the objector was a misguided one.

That if the Judge thought that the order of the Land Acquisition Court was ground for entertaining the applications for certificates, he would be entirely within his rights.

That the Subordinate Judge was not obliged in the presence of these parties, and in the absence of the person or authority from whom the money was claimed, to decide the question as to the character and reality of the claim.

That the objector in the present case was in no way damaged by the grant of the certificate. If the compensation money was not a debt due to the deceased, no Succession Act could operate as giving title to the money. Before the Land Acquisition Judge a succession certificate would in no way prevent the objector from contending that the compensation money was not a debt due to the deceased and from putting forward his own title thereto. *Brojendra Sundar Banerjee v.*

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— certificate, effect of ; *see* Succession certificate ... 239

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*Suit, maintainability of—Declaratory suit—Specific Relief Act (1 of 1877), Sec. 421—Infructuous declaration.*

Section 42 of the Specific Relief Act does not sanction every form of declaration but only a declaration that the plaintiff is entitled to any legal character or to any right to any property.

A Court will never make a declaration that is likely to be infructuous.

Three separate *jamas* were held by defendant No. 31 under three sets of landlords, defendants Nos. 1 to 30. Defendant No. 31 mortgaged the *jamas* with other lands to the plaintiff. The landlords however, ignoring the existence of the separate *jamas* instituted two suits for rent

**Suit—(Contd.).**

treating all the lands as constituting one *jama*. Having obtained decrees the defendants Nos. 1 to 30 put up the lands to sale alleging that they were the lands in arrears. The plaintiff then instituted the present suit asking that a declaration might be made that the two decrees were really money decrees and the *makal* in arrear could not be sold with power to annul incumbrances under Chapter XIV of the Bengal Tenancy Act :

*Held*, that the suit was not maintainable, as the relief prayed for was one which was not authorised by section 42 of the Specific Relief Act and as such a declaration, if permitted, would be in'fructuous without a relief in the shape of permanent injunction. **Sallendra Nath Bose v. Charu Chandra Banerjee** ... ..

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—, *maintainability of—Malicious prosecution of civil action—Damages for.*

*Quere* as to the essential ingredients for the successful bringing of a suit for damages against defendant for maliciously and without reasonable or probable cause instituting a civil action against the plaintiff claiming injunction, etc. **Albert-Bonnan v. The Imperial Tobacco Company of India Limited** ... ..

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—, *maintainability of—Suit by mortgagee against surety before realisation of debt—Deed of continuing guarantee—Construction—Surrounding circumstances—Intention of parties—Contingency—Amount for which surety is liable is less than the total debt—Right of surety to the benefit of security—Surety, when entitled to the security.*

A guarantee is a contract to indemnify upon a contingency. A guarantee, like every other contract, must be construed reasonably ; it must not only be construed by the words used, but also with regard to the surrounding circumstances. In other words, in construing a guarantee, one must look at, and is entitled to give in evidence, all the surrounding circumstances so as to know what the parties meant. Where no oral evidence is given, the intention of the parties is to be gathered from the words used with the aid of such light on the surrounding circumstances as is afforded by the documents.

If the amount for which the surety is liable is less than the total debt owing to the creditor by the debtor, it is always necessary in bankruptcy to consider whether the surety is bound for the whole of that debt with a limitation of his liability or whether he is only bound for a part of it equal to the amount for which he is liable. If the former is the case, he has no right in bankruptcy to a dividend till the creditor has received twenty shillings in the pound on the whole. If the latter, he is relieved to the extent of the proportion of the dividend attributable to that part of the debt which he has guaranteed, just as if the amount he has guaranteed were a separate distinct debt from the rest of the creditors' claim.

The right of surety to the benefit of the security held by the creditor is derived from the obligation of the principal debtor to indemnify his surety. But, a surety is not entitled to the securities which the creditor holds until he pays the entirety of the debt.

*Suit—(Contd.).*

One G, who was the owner of very considerable house and landed properties in and outside Calcutta, being in financial difficulties, applied to S for a loan of 40 lacs of rupees. S borrowed from the Imperial Bank of India 40 lacs of rupees for the accommodation of G and the latter on receipt of the amount executed a mortgage on the 14th February, 1927, in favour of S for the purpose of securing the loan of 40 lacs undertaking to pay interest at the rate of 6 per cent per annum by equal monthly instalments with quarterly rests until payment. S agreed to obtain the said loan from the Imperial Bank of India at the request of the appellants and the latter guaranteed to S the payment by G of the said sum of 40 lacs of rupees to the limit of their aggregate liability to the extent of 18 lacs of rupees whereof each of the three defendants was to be liable for 6 lacs of rupees. Clause 3 of the deed of continuing guarantee provided "within the aforesaid limit of liability this guarantee shall extend to and be applicable to the whole debt that shall *ultimately* be due to you from the said John Caraplet Galstaun in respect of such advance as aforesaid and not merely to so much whereof as shall be co-extensive with our aforesaid maximum liability thereunder." It was also agreed between S and the appellants that should the common liability be less than the said maximum aggregate sum of 18 lacs of rupees, the share due from each one of them in respect thereof should be in strict proportion to the individual liability of each of the appellants as referred to above.

S died on the 14th May, 1927 and the present plaintiffs were the executors and trustees under his will. On the 12th October 1927, the plaintiffs as such executors demanded from G immediate payment of the said sum of 40 lacs of rupees and of the interest thereon. G having failed to pay, the plaintiffs gave notice on the 15th October, 1927, to each of the present appellants of the fact of their having made the same demand on G. Thereafter on the 8th June, 1928, the plaintiffs demanded payment from each of the present appellants of the sum of 6 lacs of rupees due under and by virtue of the instrument of guarantee.

*Held*, construing the terms of the guarantee as a whole, the liability under the guarantee did not attach until the respondents have pursued their remedies under the mortgage, and if the proceeds of the sale were proved to be insufficient to satisfy G's outstanding indebtedness to S in respect of the loan.

*Per C. C. Ghose, J.* When the parties said that the guarantee should extend to and be applicable to the whole debt that should ultimately be due to S from G, they had not in their minds the peculiar rules in bankruptcy.

*Per Fage, J.* That the construction of the deed of guarantee was not free from difficulty. If the parties intended that the guarantee should only attach to the balance of the debt (if any) outstanding after the mortgaged properties such intention should be expressed in precise and unambiguous terms. If the parties intended that the guarantors should forthwith become liable upon the failure of G to repay the loan it was



## Suit—(Contd.).

unnecessary to make any reference to the mortgage in the guarantee, as the mortgage would be an independent collateral security upon the enforcement of which the liability of the guarantor in no way depended.

**Carr Lazarus Phillips v. Alfred Ernest Mitchell** ... 303

—, maintainability of—*Suit for recovery of possession in default of redemption—Limitation Act (IX of 1908), Sch. I Art. 137—Adverse possession against the mortgagor before execution of mortgage—Mortgagee, if affected by adverse possession.*

Adverse possession against the mortgagor does not affect the right of the mortgagee when it commences after the mortgage but the rule does not apply if it had begun before the mortgage.

The mortgage by the mortgagor does not stop running the time against him or any one claiming through him.

Defendants Nos. 5 and 6 were the holders of a Nimhowla right in certain property under the Howladar B. B obtained a rent decree against defendants Nos. 5 and 6, and in execution of his decree, he purchased the Nimhowla in question on the 15th April, 1906, but never obtained possession and the defendants Nos. 5 and 6 remained in possession. On the 14th March, 1908, B mortgaged the said Nimhowla to the plaintiff company. At the time of mortgage, B was not in possession of the mortgaged property and defendants Nos. 5 and 6 were in adverse possession. The date of payment under the mortgage was sometime in May, 1908. On the 12th March, 1909, defendants Nos. 5 and 6 made an application under O. 21 R. 90 of the Code of Civil Procedure for setting aside the sale of the Nimhowla. No notice was served upon the plaintiff company under O. 21 R. 92 of the Code of Civil Procedure. Meanwhile B had instituted a rent suit against F and others in respect of a Miras Karsa under the Nimhowla and in execution of his decree in that suit, the defendants Nos. 5 and 6 purchased the Miras Karsa. On the 10th April, 1910, the said defendants Nos. 5 and 6 sold the Miras Karsa to P, a benamidar of defendants Nos. 1 to 4. On the 12th April, 1910, the sale of the Nimhowla in execution of rent decree obtained by B was set aside as a result of a compromise. In 1914, the plaintiff company, not being aware that the defendants Nos. 5 and 6 or the defendants Nos. 1 to 4 had any interest whatsoever in the mortgaged property in question, brought a suit against B under the mortgage and obtained a decree in execution of which the property in question was purchased by the company on the 18th July, 1916 and they obtained symbolical possession of it. The plaintiff company brought a rent suit in 1921 against defendants Nos. 5 and 6 in respect of the Miras Karsa held under the said Nimhowla. The suit was dismissed. The plaintiff became aware of the interest of the defendants Nos. 1 to 6 in 1921. The plaintiff company then instituted the present suit on the 14th December, 1921, for recovery of possession of the property in question subject to the right of redemption of the parties who had not been joined in the suit on the mortgage. *Held*, that though the suit was maintainable in the present form, it was

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| <b>Suit—(Contd.).</b>                                                                                                                                                                                                                                                                                                                                                         |       |
| barred by limitation, as the time had begun to run against the plaintiff company from the date of B's purchase, viz., on the 15th April, 1906.                                                                                                                                                                                                                                |       |
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| — for declaration that decrees are money decrees and the mahal in arrear could not be sold with power to annul incumbrances—Landlord ignoring existence of separate <i>jamas</i> instituted two suits for rent treating all lands as constituting one <i>jama</i> and having obtained decrees, in execution put up the lands to sale; <i>see</i> Suit, maintainability of ... | 257   |
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At a meeting of the Commissioners two resolutions were moved and seconded. The first was "That the question of a general revision of assessment be postponed for a year in view of the economic distress prevailing in the country, and that all new and improved buildings which had escaped notice be assessed first, and the Vice-Chairman be requested to undertake the work." The second was "That the general revision of assessment of holdings be undertaken without delay, as it was overdue." The appellant urged that under the bye-laws of the Municipality (Rule 16) the Chairman was bound to put the two resolutions separately and not alternatively:

*Held*, that as such objection was not urged in the High Court, the proceedings objected to were not enquired into and the objection was held to be without any real substance.

It was also contended that the rate was invalid because the Commissioners, before the result of the re-valuation had been ascertained, and became

## Tax—(Contd.)

|                                                                                                                                                                                                                                                                                                                                                                                                                 |     |
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| known to them, sanctioned a budget framed on the basis of the old valuation and of the percentage of which rates had been for some years levied on that valuation i. e. 10 per cent being the highest percentage which the Municipal Act allowed. It was in evidence that the re-valuation list was subsequently signed by the Chairman and deposited in the office and notice was published on the same date ; |     |
| <i>Held</i> , that under section 102 of the Municipal Act, there was no illegality.                                                                                                                                                                                                                                                                                                                             |     |
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| Utbandi, raiyat, who has acquired right of occupancy—Liability to pay fair and equitable rent—Bengal Tenancy Act, Secs. 180 A, 180 B, no fixity of uniform annual money rent under ; <i>see</i> Utbandi tenant                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 294   |
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| <p>There is nothing in section 180A or section 180B of the Bengal Tenancy Act which takes away the rights which are conferred by section 180 upon an utbandi raiyat who has acquired a right of occupancy and, even if resort is not made to the provisions of sections 180A and 180B for the purpose of fixing a uniform annual money rent in respect of utbandi lands, the general liability of an occupancy raiyat to pay a fair and equitable rent for the lands that he holds will accrue to a person who was in a position of an utbandi raiyat and has acquired a right of occupancy under the provision of section 180.</p> <p>Where the suit instituted was one for recovery of rent at rents agreed upon by all the utbandi tenants and not for recovery of rent in accordance with the provisions of section 24 of the Bengal Tenancy Act, to have a decree for rent at fair and equitable rates, the plaintiffs would have to ask first of all for assessment of rent in a properly constituted suit with their co-sharers as parties.</p> <p><i>Per Mitter, J :</i> Under section 153 of the Bengal Tenancy Act, a second appeal is entertained, as the Court determined what was the rate of rent payable in respect of certain classes of land : rent included money as well as paddy rent. <i>Nafar Chandra Pal Chowdhury v. Jatindra Nath Das</i></p> |       |
| Valuation— <i>Memorandum of appeal—Court-Fees Act (VII of 1870), Secs. 7, 9, 10, 12—Valuation, evidence of—Charts of land value—Evidentiary value.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 294   |
| <p>In the case of suits for possession of land, under section 7 of the Court-Fees Act, the subject matter is to be valued according to the market value and the fee is to be computed according to the market value. Whether the fee paid is sufficient or not, it is impossible to tell without travelling outside the plaint or the memorandum of appeal.</p> <p>In the ordinary way, a Court to which a document such as a plaint or a memorandum of appeal is presented will not reject the document unless it has proof that the document is insufficiently stamped. When the Court is satisfied that the document is under-valued, it may require a further payment, and, on the further payment not being made, it may reject the plaint.</p> <p>In a suit for possession of land, the plaintiff should not be called upon to give evidence on the question of value merely in order to get his docu-</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                       |       |

**Valuation—(Contd.).**

ment upon the file, before the plaint or memorandum of appeal can be registered.

For cases of the class which depend upon the valuation, the particular and appropriate provisions of section 9 of the Court-Fees Act should always be used.

If the Court wants the question of under-valuation to be pursued, it should undertake the investigation in a judicial manner. Under section 9 of the Court-Fees Act, the Court is to issue a commission to any proper person directing him to make local or other investigation and to report to it. The Judge then has a judicial duty to come to a decision on the basis of the Commissioner's report. Such a commission is a commission under the Civil Procedure Code and what the Commissioner may do and what the duty of the Judge is, is laid down in the Civil Procedure Code.

The mere fact that a Court can issue a commission shows that the Court can make itself judicial enquiry if it so minded.

The investigation as to valuation for the purpose of court fee should not be embarked upon without due reason. The appointment of a Commissioner under section 9 of the Court-Fees Act is discouraged as it is very apt to be oppressive to the plaintiff.

If an investigation is undertaken by the Judge himself, it is entirely wrong to suppose that the plaintiff has first to give evidence to satisfy the Court of the propriety of his valuation before he is entitled to get the plaint or memorandum of appeal registered. The proper course is to deal with the matter when the plaint or the memorandum of appeal has been filed.

The plaintiff brought his suit for possession of certain land exceeding 3 kais in area, and valued the land at Rs. 150. No question was raised by the defendant as to the sufficiency of the valuation. The suit was dismissed by the primary Court for failure of the plaintiff to prove his title to the land claimed. The plaintiff appealed and upon that appeal being presented, the learned District Judge appeared to have examined into the question of valuation. The plaintiff valued the appeal as he had valued his suit at Rs. 150. The learned District Judge was desirous of requiring the plaintiff to prove that the memorandum was sufficiently valued. He required the plaintiff to show the nature of the land by filing a map and Khatian. He asked the lower Court to explain its valuation. The defendant produced a Kobala which as evidence of value did not satisfy the learned Judge. As the appellant did not give evidence of the sufficiency or correctness of his valuation, the learned District Judge raised the valuation to Rs. 300 both for the purpose of the memorandum of appeal and for the purpose of the plaint. The learned Judge did that without there being any evidence before him at all on which he was entitled to act:

*Held*, that as it was not clear from the plaint or the memorandum of appeal itself that there had been an under-valuation, the reasonable course was

**Valuation—(Contd.)**

to register the plaint or the memorandum of appeal and take appropriate steps thereafter for enquiring into any matter that called for enquiry.

That there was no illegality in any reference to a chart of land value or to a gazetteer or to any thing else that would assist. It was not a question of judicial decision.

That the chart of land value should not be put upon the parties as though it were evidence in itself and any judicial officer acting in a judicial matter upon such chart was acting without evidence before him.

That the learned Judge in refusing to permit the appeal to be filed unless the plaintiff pay further fees in respect of the document in the lower Court followed a practice which was not to be commended and which was of an extremely doubtful nature.

That the learned Judge should have registered the memorandum of appeal on the fee which was paid and, after he had done that, if he had any uneasiness as to the revenue having received its proper dues, he might take appropriate action under the appropriate section, namely, section 9 of the Court-Fees Act by appointing a Commissioner, if he thought fit or by holding a judicial enquiry himself. When that was done, if it turned out that the plaintiff had over-valued his claim, he would get the benefit, but if it was under valued, the course prescribed by the statute would have to be followed.

That he could reject the memorandum of appeal under the second half of section 12 of the Court-Fees Act.

The practice in the High Court when a document in the lower Court was under-valued is laid down in *Bidhu Bhushan v. Kalu Chand Jalokha Bibi. Danis Mahammad* ... 173

—, investigation as to, by Judge himself—Plaintiff, if to satisfy the Court the propriety of his valuation—Registration of plaint or memorandum of appeal; *see* Valuation ... 164

—, investigation as to, for the purpose of Court-fee; *see* Valuation... 164

**Verdict** of jury, unanimous—Speculations as to influencing the jury by certain allegations—Verdict justified by evidence; *see* Misdirection ... 106

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*Will, construction of—Daughter's estate—Power to alienate—Surrounding circumstances—Ekrarnama between two sisters curtailing the jus accrescendi.*

The circumstances of the testator referred to in his will and surrounding him at its date, are not irrelevant upon the question of construction as to daughter's claim to a declaration of an absolute interest.

The clause of the Will upon which was rested the appellant's claim to a declaration of an absolute interest was as follows: "After my death my said two daughters shall be my lawful heirs, and they alone shall in equal shares become owners of all my properties subject to the provisions of this Will: the (said) two daughters shall acquire all manner of rights consistent with Hindu Law, in the properties that shall be left by me. God forbid, if my death takes place after the marriage of one daughter and before the marriage of another, then the unmarried daughter shall not be entitled to claim the entire property by virtue of her not being given in marriage, nor shall she get the same; even if such a circumstance should happen, both the daughters shall inherit in equal shares. The daughters and their sons, that is to say my heirs, shall enjoy the properties etc., so long as they shall live in this house...Nobody shall ever by fixing the abode at any other place than this be entitled to own or enjoy the property. None shall be competent to succeed to the property who may go to live elsewhere."

Within three months of making his will, the testator died leaving his two daughters, the appellant and her sister, unmarried surviving. Subsequently the daughters married and had sons, the appellant had one son and her sister, three sons. The sister died on the 12th June, 1914.

On the 17th April, 1909, the sisters executed an Ekrarnama which provided "If one of the sisters should die the son or sons of the predeceased should so long as the other sister lives remain owners in possession in the same manner as his or their mother had been of the one half share of the movable and immovable property left her by her father. On the death of the surviving sister the sons of both are to have such right and share as they are entitled to get under the testator's will."

At the date of the Ekrarnama, the appellant had one son and the sister had three sons:

*Held*, that the only interest given by the Will to his daughters respectively in the property of the testator was the interest of a daughter as recognised by the Hindu Law. The interest taken by each of the testator's daughter under the Will was one which determined with her death.

A power to alienate is an essential incident of an absolute interest in property.

*Held, further*, that the Ekrarnama was effective to dispose in favour of the sons of the sister during the life of the appellant of the moiety of the testator's estate appertaining to their deceased mother.

It was contended that the Ekrarnama was not binding on the appellant at all, as, it was, in the event which had happened, no more than a grant in favour of the sister's sons, and while still a mere expectancy under the

**Will—(Contd.).**

will the appellant, by the operation of the *jus accrescendi* might become entitled on her sister's death in her life time. Their Lordships did not entertain this contention. *Joydurga Dasi v. Saroj Ranjan Sinha* ...

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**Winding-up—Arrangement to pay off creditor—Mortgage—Arrangement sanctioned by Court—Amended scheme not submitted for approval by share-holders, but sanctioned by Court, if valid—Usufructuary mortgage—Transfer of Property Act (IV of 1882), Sec. 76.**

An amended scheme in a winding-up proceeding, to advance substantial sums on mortgage on the terms that the mortgagee would manage the business for a term of years and recoup themselves out of the profits, though sanctioned by the Court, is not valid, if not approved by the share-holders at their meeting.

The proposed mortgage in the present case is an usufructuary mortgage; and no further duty of care can be imposed upon the mortgagee than arises out of the statutory duties imposed upon mortgagees in possession under section 76 of the Transfer of Property Act on the one hand, or of the ordinary legal duties of managing agents on the other. *Messrs. Kamlapat Moti Lal v. The Union Indian Sugar Mills Company Limited (in Liquidation)* ...

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**Witness, if hostile—Public prosecutor asking permission of Court to put question to witness which might be put by the adverse party; see Misdirection** ...

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### ERRATA.

Page 55 line 37 for (1) read (5).

Page 318 line 6 for "such" read "suit".

Page 428 line 37 after 'Mandal's' read (1).

Page 428 footnote for "(5) (1897) I. L. R. 24 Calc. 429" read

"(5) (1909) 5 A. L. J. 989.

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# The Calcutta Law Journal.

VOL. L.

CALCUTTA, 1ST JULY, 1929.

No. 1.

## NOTES OF CASES.

*Workmen's Compensation Act (Act VIII of 1923), sections 3 (1) b(ii) and 30—Meaning of "wilful disobedience"—Whether employer can claim exemption for workmen's contributory negligence and whether a safety rule as printed is a rule which conformed to the provisions of section 3(1) b(ii).*

Husband of one of the claimants and son of the other, both employees of Tata Iron and Steel Company, were run over and killed by an engine in their works while in the course of their employment with the Company. Thereupon the claimants initiated proceedings against the Company for compensation under the Workmen's Compensation Act of 1923. The Company denied liability pleading wilful disobedience of their safety rules by the deceased workmen. The Deputy Commissioner before whom the proceedings lay in the first instance found wilful disobedience on the part of the deceased workmen and disallowed the claims. Thereupon the claimants came up before the High Court under section 30 of the Workmen's Compensation Act. The question was whether employer could claim exemption for contributory negligence on the part of workmen and whether a rule of caution was a rule contemplated by section 3(1) b(ii):

Held (*per Kulkarni Sahay and Macpherson JJ.*) that contributory negligence on the part of employee did not exonerate the employer from liability to compensate the employee if the accident could have been avoided by the deceased workmen by the exercise of ordinary care and diligence and that the accident was not directly attributable to the wilful disobedience of the workmen within the meaning of section 3 (1) b(ii) and that therefore the claimants were entitled to a compensation.

I. L. R. 8 Pat. 24.

1928.

Urmila Dasi

v.

Tata Iron and steel  
Company.

I. L. R. 8 Pat. 413.

1928.

Raja Joyti Prasad  
Singh Deo Bahadur

v.

Chota Nagpur Bank-  
ing Association.

*Banker and constituent—Constituent's cheque paid to a local constituent by a branch of bank other than that where account is kept—Cheque eventually dishonoured—Whereupon the branch bank proceeded against the local constituent for recovery of amount paid.*

Defendant 3 gave a cheque to defendant 1 for Rs. 5000 upon the Chota Nagpur Banking Association, Dhanbad branch. Defendant 1 endorsed it in favour of defendant 2 who received payment thereof through his account in the same bank at Purulia. The Purulia branch then sent over that cheque to Dhanbad branch for collection. Thereupon Dhanbad informed the Purulia branch that the money had not been arranged for. Then the Purulia branch instituted a suit against defendants 1 and 2. The suit was resisted on the ground that inasmuch as the payment had already been made and the cheque discharged there was no power left in the Purulia branch to institute the suit. The Subordinate Judge dismissed the suit. Thereupon this second appeal. The question was whether the cheque having been discharged by payment power was left to the Purulia branch to sue for recovery of amount from defendants 1 and 2 :

Held (*per Das and James JJ.*) that the payment having been made by the Purulia branch on the credit of its local constituent and not on the credit of the person originally issuing the cheque the branch making the payment can institute a suit for recovery of the amount paid from the local constituent as well as from the person from whom he got the cheque.

I. L. R. 8 Pat. 418.

1928.

Hafiz Zeyauddin

v.

Jugdeo Singh.

*In a suit for produce-rent the onus about the produce is on the tenant.*

Plaintiff Hafiz Zeyauddin sued Jugdeo Singh his tenant for share of produce-rent due to him for a certain number of years. Relying on the admission of the tenant Jugdeo Singh but disbelieving his evidence the Subordinate Judge gave a decree to the plaintiff. But as that was considered inadequate the plaintiff came up in second appeal before the High Court. The question was whether the Subordinate Judge's acceptance of the admission of defendant tenant and rejection of his evidence was proper :

Held (*per Das and James JJ.*) that the entire onus lay on the defendants to satisfy the Court what was the produce during the years in suit.

*International Law—Recognition of Soviet Government—Validity of sale of goods confiscated by Russian Government.*

[1929] 1 K. B. 718.

1929.

Princess Paley Olga  
v.  
Weiss & Orr.

In 1918 a section of Russian revolutionaries took and retained possession of valuable moveable properties of the plaintiff, widow of the Grand Duke Paul of Russia, against her will. The act of those revolutionaries was subsequently adopted by the Soviet Republic. The British Government in 1924 recognised the Soviet Republic as the *de jure* Government of Russia. In 1928 the moveables in question were sold in Russia by the Soviet Republic to the defendants who brought them in England. The plaintiff brought this action to recover those moveables or damages for their detention or conversion.

Held, (*per Scrutton L. J., Sankey L. J. and Russell L. J.*) that the action failed. English Courts will not enquire into the validity of the acts of a recognised foreign Government against its own subjects in respect of property situated in its own territory.

The following observations of the Supreme Court of the United States of America were cited with approval :—

“When the Government which originates in revolution or revolt is recognised by the political department of our Government as the *de jure* Government of the country in which it is established, such recognition is retrospective in effect and validates the actions and conduct of the Government so recognised from the commencement of its existence.”

*Ostjen's Case*, 246 U. S. 302.

## REVIEW.

**Probate Procedure in British India** by H. D. Cornish, B. A., Barrister-at-law ; Published by Higginbothams, Madras, 1928.

We congratulate the Administrator-General of Madras on his excellent work. India has badly needed her “Tristram and Coote.” It may be due to various historical factors. Wills were not recognised by the common law of the Hindus. Islamic jurisprudence which recognised a very restricted form of testamentary power, hardly made any impression on Brahmanical Law in this respect. One of the most remarkable changes effected by British rule and the influence of English Law is the assumption of testamentary power and its ultimate recognition by codified law of this country.

The work under review comprises 7 chapters on the Testator, Will, the Executor, the Administrator, the Petition for probate, Probate jurisdiction and the Grant. Appendices contain the testamentary rules of the different High Courts. The chapters are carefully written and wise discrimination has been exercised in the citation of both English and Indian cases. This work will supply the legal profession with a fairly complete practice of the contentious and non-contentious business of the Courts in respect of grant of probate.

The greatest difficulty in this branch of the law in India has been the importation of English notions and the imposition of English practice on the totally different conditions obtaining in this country. Testamentary jurisdiction was first granted to the Supreme Courts by their original charters. The premier presidency of Bengal first got it in 1774. But the gift came in a most peculiar fashion.

Testamentary jurisdiction was given as a branch of ecclesiastical jurisdiction and was to be administered according to the ecclesiastical law as in force in the Diocese of London.

As Sir Arthur Wilson pointed out in *Kurratulain's case* (32 I. A. 244) in the course of the series of events by which the British territories in India grew from a group of trading settlements into an empire, various branches of jurisdiction have come to be applied by a number of legislative acts to new territories and new classes of persons, and administered by new tribunals. In the progress of this development the ecclesiastical origin of such jurisdiction has been completely discarded, and the Legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English Law, but also differing much from that law, and purporting to be a self-contained system. Even in the case of the High Courts, the successors of the Supreme Courts, the testamentary jurisdiction which the charters purported to confer upon them, was not given as a branch of ecclesiastical jurisdiction, and was not made dependent upon the law administered by English Courts.

We find this case has been cited in the book under review at page 197. In spite, however, of the observations of the Judicial Committee, the Courts in India have often gone astray by the peculiarities of the English law and procedure. The clearest provisions of the different Acts of the Indian legislature were often overlooked or disregarded and the probate practice of England, sometimes taken from ecclesiastical reports, was blindly followed.

It was, therefore, necessary for Lord Sinha in the recent Patna case, *Ramanand v. Kalawati* (55 I. A. 18) to administer the final admonitions that questions of probate law and procedure in India should be determined upon an examination of the language of the relevant Indian enactment, uninfluenced by any consideration of the previous state of the law, or the English law upon which the enactment is founded.

This case has not been cited by the learned author in the work under review. Possibly it reached India too late for incorporation into the work, but it is fairly obvious that the learned author has followed the salutary rule laid down by the Judicial Committee.

The book is published by the well known Madras firm of Higginbothams. The get up is excellent and the consideration is reasonable. We recommend this manual heartily to the legal profession.

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#### THE LATE MR. B. CHAKRAVARTY.

Bengal has lost another of her illustrious sons. The sad event took place early in the morning on Friday, the 21st of June 1929 when that distinguished leader of the Bar, Mr. Byomkesh Chakravarti passed away.

Born of a poor Brahmin family, Mr. Chakravarti had his school and college education through the help of friends and relations. He had a brilliant University career and at first took up educational service at Cuttack and then at the Bengal Engineering College where he was a lecturer in Physics and Mathematics. In 1881 he sailed for England on receiving a Government scholarship for studying agriculture, and along with the agricultural studies there he joined the Lincoln's Inn and passed with great distinction having secured a scholarship of £100 in his final. On his return he decided to practise at the Calcutta Bar and was sworn in as an Advocate of the Calcutta High Court on the 29th of July 1886. His success at the Bar is too well known to need repetition here.

The best in the man was his intellectual side. He was a sound Sanskrit scholar and in point of scholarship, culture, and refinement, he held a very high position.



*Reference in Court.*

Reference was made on Monday, 25th of June 1929 before the Chief Justice and Mr. Justice Panckridge of the death of Mr. B. Chakravarti, Barrister-at-Law.

*The Advocate-General (Mr. N. Sircar)* on behalf of the English Bar mentioning the death said that Mr. Chakravarti was a very prominent member in the front rank for a very considerable time. While at the Bar, he was remarkable for his industry, perseverance and the tenacity with which he fought his cases. He took this opportunity of expressing their opinion that in him they had lost an erudite and industrious lawyer.

*Mr. Gunada Charan Sen* on behalf of the Bar Association remarked that Mr. Chakravarti used to take a lively interest in the efforts made in the political and industrial regeneration of the country.

*Sir Deva Prasad Sarbadhikary* on behalf of the Incorporated Law Society said that Mr. Chakravarti was a true Vedantist and he knew how to face the vicissitudes of the world. He largely employed his financial resources for the publication of obscure books in Sanskrit Sastras and rendered a service, not only to the scholar world, but also to his country at large.

On behalf of the Judges, *the Chief Justice* expressed their regret at the loss of a very distinguished member of the Bar. When his lordship came to this Court, Mr. Chakravarti was still in practice although his main interest would seem to have laid elsewhere. He had had in his time a very extensive practice and was at the very top in the profession. He was familiar with all branches of the Law and had great experience both on the Original Side and the Land Tenure Cases, on the Appellate Side.

Mr. B. Chakravarti, His Lordship proceeded, had a well-furnished mind in respect of learning, logic and knowledge of the world. In this profession they were glad to think that they were reaping the reward of his great ability and sound judgment. In this Court he would be long remembered as a capable and reliable counsel who had held the traditions of this Court, was competent, hard-working and courteous and had a forcible reasoning. The Judges tendered their sincere sympathy to the members of the bereaved family.

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# The Calcutta Law Journal.

VOL. L.

CALCUTTA, 16TH JULY, 1929.

No. 3.

## THE LATE MR. JUSTICE PANTON.

Tributes from the Bench and the Bar were paid to the memory of Mr. Justice Panton when the Advocate General mentioned the sad news to the Full Court on Friday, the 12th of July 1929.

*The Chief Justice* said :—The death of Mr. Justice Panton has taken from this Bench a wise and careful Judge and from his colleagues a friend whose absence will long be felt. We remember with much sorrow how some three years ago while sitting in this Court, he had a sharp and painful onset of the disease which was to cripple his activities and cut short his life. It is only the other day that a gallant and indeed over-brave attempt to return to service came to an end and he left us hoping against hope that leisure and retirement might prolong his days. In the earlier years of his service he had a very wide experience of different districts of this Province, an experience which he never forgot, and which in due time was to be of the utmost value to this Court. His was a clear, accurate and incisive mind, trained early in scientific method and ever distrustful of loose theory and empty logic. It is with gratitude and with pride that the Judges recognise to-day that you with them will carry into the future a memory of their friend as a Judge whose clarity of mind, knowledge of the country, and skill in the law has never fallen short of the highest standards.

Nine days out of ten a Judge,—to himself or to others,—is but a wheel in the creaking machinery of the law ; but to-day is the tenth day, and the Judges would join with you in a last tribute of affection and respect to the memory of Mr. Justice Panton and in an expression of sincerest sympathy with his family and friends.

On behalf of the English Bar, *the Advocate General* (Mr. N. M. Sircar) said that Mr. Justice Panton sat on the bench of this Court for the last seven years. Little can they realise that his end would

come so soon. His unfailing courtesy and kindness from the Bench won him the love of the members of the Bar and litigant public. He spoke feelingly of the politics of the late Judge and the loss which the Bar suffered in his death.

*Dr. S. C. Basak* on behalf of the Advocates said that there was never an occasion for the late Judge to show heat or impatience from the bench during his tenure of service.

*Sir D. P. Sarbadhikary* on behalf of the Incorporated Law Society said that he had never the pleasure of coming in contact with the late Judge officially but he met him socially times without number. His unfailing courtesy and kindness made him dear to his friends and to all who came in contact with him.

We are deeply grieved at the sudden death of Mr. Justice Panton and we are in full sympathy with all that has been said of the late lamented Judge. Our sincere condolences go to the members of the bereaved family.

## REVIEWS.

**Principles of the English Law of Contract**—by Sir William R. Anson, Bart., D. C. L. Seventeenth Edition by John C. Miles, Kt., M. A., B. C. L. and J. L. Brierly, M. A., B. C. L. Oxford: The Clarendon Press, 1929. Price 15s.

Anson on contracts is a classical work for the student of law. A seventeenth edition of the work therefore needs little more than a cordial welcome. The editors of this edition have done their work conscientiously and have, on the one hand made all the changes that the development of a growing branch of law demanded, and on the other hand scrupulously followed the manner and method of the author, so much so that the additions can hardly be distinguished from the original text. Omissions have been judiciously made of matters which have out grown the limits to which they must needs be confined in a general treatise on contract. The most important changes have been made in the sections relating to part performance, composition with creditors, infants' contracts, mistake, restraint of trade, wages, severability of illegal contracts, effect of notice of covenants on an assignment of contract, conditions and warranties and quantum meruit, on which subjects recent develop-

ments in the law required an overhauling of the old text. We have no doubt that the student of law will find this edition as helpful as previous ones.

**The Indian Court-fees Act (VII of 1870) and The Suits Valuation Act (VII of 1887)**—by J. C. Bhowmik, B. L. Third Edition, 1929. Published by M. C. Sarkar and Sons, Calcutta. Price Rs. 4-8.

This is a third edition of one of the popular editions of these acts. The Court-fees Act has been so largely and variously amended in the various provinces that an elegant treatment of the whole subject in a single treatise has become well nigh impossible. The author has however made every endeavour to study the convenience of the practitioner in his commentary. All the various provincial amendments have been noted under the appropriate sections and articles and the various amending acts of the provinces have also been set out separately in extenso. The notes are full and accurate. Differences in the views of different High Courts upon the various provisions have been carefully noted. The case law is up-to-date.

#### NOTES OF CASES.

*Consent order.—Estoppel—Reply that consent was induced by fraudulent concealment.*

[1929] A. C. 482.

The plaintiff in an action for damages for conspiracy based his claim upon certain charges which she had withdrawn by a consent order in a previous action for libel between the parties. The defendants pleaded that the plaintiff was estopped by the consent order. The plaintiff by reply pleaded that his consent had been induced by fraudulent concealment of the fact that one of the parties intended to prosecute him for perjury in an affidavit containing the charges.

1929.

Kinch

v.

Walcott & Ors.

Held, (*per Viscount Sumner, Lord Carson and Lord Blanesburgh*) that the plaintiff is precluded from making such a plea in reply. An order by consent is binding unless and until it has been set aside in proceedings constituted for that purpose.

*Ainsworth v. Wilding* [1896] 1 Ch. 673 approved.

*Firm of R. M. E. R. M. v. Firm of M. R. M. V. L.* [1916] A. C. 761, 771, followed.

243 S. E. 41.  
W. Va. 1928.

Young  
v.  
Jordan.

*Physician—Liability for want of due care.*

In this case a question of some importance has been decided. J, a physician gave medicine to Y, the plaintiff to bring on labor at child birth. The physician however failed to return within a few hours or to remain at his office where he was to be reached if needed before, as he had promised. The plaintiff suffered considerably, another doctor was called to alleviate her pain and to deliver the child. J, the defendant physician in the meantime attended another patient who was also in child birth.

*Held*, that the defendant physician ought not to have left the plaintiff unattended and the fact that the physician attended another patient at the time does not exempt him from liability for the plaintiff's unalleviated suffering.

The law imposes upon a physician who undertakes to treat a patient the duty of exercising reasonable care and skill. The present case further decided that want of due care may consist in a discontinuance of attendance.

I. L. R. 51 All. 341.

1928.

Balkunth Nath  
v.  
Jai Kishan.

*Burden of proof—Hindu widow purchasing property—Accretion to husband's estate or stridhan—Presumption.*

M, a Hindu widow purchased a house under a sale-deed for a sum of Rs. 600. This sum consisted of Rs. 500 advanced by her previously and a sum of Rs. 100 paid at the time of purchase. There was absolutely no evidence on either side to show where she had got the money which she advanced as a loan in the first instance and where she got Rs. 100 from. The reversionary heirs of M's husband sued M for recovery of possession of the house purchased by the widow. Their case was that the house was purchased out of the savings of her husband's estate. But no evidence was adduced to show the source from which Rs. 600 came.

*Held* (*per Sulaiman, A. C. J. and Kendall, J.*) that there is no presumption in law that when a Hindu widow in possession of her husband's estate makes a purchase of property, the purchase money came out of the savings from her husband's estate. The burden of proof is on the reversioner who claimed the property to establish that the property was acquired out of such savings.

2 C. W. N. 197 and I. L. R. 26 Cal. 871, were referred to.

# The Calcutta Law Journal.

VOL. L.

CALCUTTA, 1ST AUGUST, 1929.

No. 3.

## NEW HIGH COURT RULES.

### *Preparation of Paper Books.*

No. 12879G\*—It is hereby notified for general information that with effect from the 15th day of August 1929, and until further notice the following Rules framed by the High Court of Judicature at Fort William in Bengal in the exercise of the power vested in it by section 37 of the Letters Patent will be substituted for the existing rules contained in Chapter IX of the Appellate Side Rules. The Court's notifications Nos. 13430(G), dated the 1st September 1928, and 17398 (G), dated the 11th December 1928, will be treated as cancelled with effect from the date on which the following Rules come into force :—

### Chapter IX.—Preparation of Paper Books.

#### Part I.—General.

1. The printing of Paper-books shall be in accordance with the following directions :—

(a) the Paper-books shall be printed in the form known as demy quarto, i. e. 54 ems (or 9 inches) in length and 42 ems (or 7 inches) in width ;

(b) the size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches long and  $8\frac{1}{2}$  inches wide ;

(c) the type to be used in the text shall be pica type, but long primer shall be used in printing accounts, tabular matter and notes ;

(d) the number of lines in each page of pica type shall be 47, or thereabouts, and every tenth line shall be numbered in the margin, i. e., the tenth line will be numbered 10, and the second 20, and so on ;

(e) the stationery required for the Paper-book shall be provided by the office only for the preparation of the Paper-books in Second Appeals.

\* Published in the Calcutta Gazette, Part I page 1534.

2. "Editing" the Paper-book shall include—

(i) collecting and arranging the papers required for inclusion in the Paper-book ;

(ii) examining and comparing proofs, or, when several copies of a typed Paper-book are prepared, examining and comparing such copies (other than the first copy) with the originals or authenticated copies of English papers or translations where the rules provide for translations ;

(iii) the preparation of title pages and indexes ; and

(iv) the general supervision necessary to ensure the accuracy of the record and compliance with the provisions of the Appellate Side Rules with regard to the preparation of Paper-books.

Note.—The repetition of unnecessary titles in documents should be avoided and formal portions of documents omitted.

3. Every Paper-book shall have attached to it a fly-leaf in the prescribed form, and giving the particulars required by Rule 41.

4. In urgent cases, upon good cause being shown, the Registrar may allow any part to put in such number of typed copies of the Paper-book as he may consider necessary.

*Exception.*—In an appeal which is to be heard under Order XLI, Rule 11, Civil Procedure Code, no Paper-book shall be prepared unless and until an order for the service of notice on the respondent has been made.

5. There shall be inserted at the end of one copy of the Paper-book prepared in every case, and in the following form, a statement in which shall be specified each item of the costs incurred in its preparation by the appellant and the respondent, respectively :—

|                                                                                                | By the Appellant. |                 |         | By the Respondent. |                 |         |
|------------------------------------------------------------------------------------------------|-------------------|-----------------|---------|--------------------|-----------------|---------|
|                                                                                                | Number of pages.  | Rate of charge. | Amount. | Number of pages.   | Rate of charge. | Amount. |
|                                                                                                |                   |                 | Rs.     |                    |                 | Rs.     |
| Estimating ...<br>Translating, etc.<br>(as in Rule 46<br>or Rule 50 as<br>the case may<br>be). |                   |                 |         |                    |                 |         |

6. In the case of Appeals, other than appeals from Appellate Decrees, any surplus remaining after deducting the costs actually incurred by each party from the amount deposited with the Accountant of the Court may be refunded upon request to the party by whom the deposit was made, or to the Advocate entitled to act for such party.

7. The costs incurred in the preparation of the Paper-book shall be costs in the appeal, unless as to the whole or any portion thereof the Court which hears the appeal shall otherwise direct.

8. The Registrar may, upon application and upon sufficient cause being shown, enlarge the time prescribed by these rules for doing any act to be done under their provisions. An application for enlargement of time must ordinarily be made before the expiry of the prescribed time and be supported by an affidavit of facts. The Registrar may also, upon application and upon sufficient grounds proved by affidavit, exempt any appellant or respondent from the operation of the whole or any part of these rules, or may make such special order as he deems fit as to any matter with which these rules are concerned. In case any affidavit to be used under this rule is sent from the maffasal and is in the vernacular, it shall be accompanied by an English translation, certified to be correct by an Advocate or a Translator of this Court.

9. When these rules direct or allow any act to be done by, or any notice to be given to, an appellant or respondent, such act may be done by, or such notice given to, the Advocate, or (where authorised in that behalf by the rules of the High Court) the Mukhtear of such appellant or respondent.

## Part II—Appeals from Original Decrees.

### A—GENERAL.

10. On receipt of the record from the Lower Court it shall be the duty of the Registrar to see that the Paper-book in an Appeal from an Original Decree for the use of the High Court at its hearing is prepared in accordance with the directions given in the following rules.

Provided that the Registrar or the Division Court having jurisdiction over any particular Group may, for sufficient cause shown, pass any special order regarding the preparation of the Paper-book of any particular appeal belonging to that Group.

11. Part I of the Paper-book shall contain the following papers:—

(a) order-sheet ;



- \**(b)* the plaint ;
- (c)* schedules, if any ;
- \**(d)* written statements of parties ;
- \**(e)* examination of parties or their agents, etc. ;
- \**(f)* injunctions ;
- \**(g)* orders of attachment, etc., (if any), obtained before judgment ;
- \**(h)* issues framed (if any) ;
- (i)* depositions of witnesses for plaintiff ;
- (j)* depositions of witnesses for defendant ;
- \**(k)* report of Commissioner (if any) with maps, depositions, etc., annexed ;
- \**(l)* the judgment and the decree or order from which the appeal is preferred, exclusive of schedules ;
- \**(m)* memorandum of appeal ;
- \**(n)* any other paper, other than an exhibit, on which the decision of the appeal depends.

Part I shall also contain an index which shall be drawn up in accordance with the provisions of Rule 47(ii).

Part II of the Paper-book shall consist of the Exhibits.

12. Upon the receipt of the record, the Deputy Registrar shall serve a notice on the appellant requiring him to prepare and deliver to such Deputy Registrar—

(a) A list of papers (other than those marked\* in Rule 11 above, and the exhibits) upon which the decision of the appeal depends and which the appellant desires to have included in Part I of the Paper-book at his expense. Such list shall be called "List A."

(b) A list of the exhibits to be inserted in Part II of the Paper-book at the expense of such appellant. Such list shall be called "List B."

13. Such lists shall be in the following form :—

| Number on the record. | Mark (if any) in the Court below. | Description and date of paper. | Whether the whole or portion and (in case of a portion) what portion to be inserted in the Paper-book. | Page of Paper-book (to be filled in later). |
|-----------------------|-----------------------------------|--------------------------------|--------------------------------------------------------------------------------------------------------|---------------------------------------------|
|                       |                                   |                                |                                                                                                        |                                             |

Printed forms of lists will be supplied to the parties or the Advocates entitled to act for them, free of cost, on application to the Forms Clerk.

14. There shall be entered in such lists all documents on which the decision of the Appeal depends.

Provided that if it is necessary only to print a portion of any particular document for the decision of the appeal the relevant portion shall be specified.

15. The list of exhibits (List B) should retain their original numbers with the proper page number attached. The documents should be arranged, as far as suitable, in chronological order, mixing plaintiff's and defendant's documents together when necessary, but in all cases documents relating to the same series, or to the same subject (*e. g.*, a series of correspondence, or proceedings in a suit other than the one under appeal), should be kept together. A correct and full description of such documents must be given.

16. The appellant shall, within two weeks after service of the notice required by Rule 12, deliver to the Deputy Registrar both "List A" and "List B" prepared in accordance with the above rules. These lists shall be termed "The Appellant's Lists."

17. On receipt of the lists of the papers to be included in Parts I and II of the Paper-book at the expense of the appellant (List A and List B) the Deputy Registrar shall cause to be prepared estimates of the costs of the preparation of Parts I and II of the Paper-book.

18. As soon as the lists are delivered to the Deputy Registrar by the Appellant, he shall, if the respondent enters appearance on or before the date mentioned in the notice under Order XLI, Rule 14, Civil Procedure Code, give notice of such delivery to such respondent. If the respondent fail to enter appearance on or before the date mentioned in the notice under Order XLI, Rule 14, and if it shall appear that the said notice has been duly served on such respondent, he shall not without the leave of the Registrar be entitled to file a list of papers for insertion in the Paper-book under Rule 20.

19. Every respondent who has entered appearance shall be entitled to inspect the appellant's list and, at his own expense, to obtain a copy of the whole or of any portion thereof.

20. Every such respondent shall, within two weeks after service upon him of the notice required by Rule 18, deliver to the Deputy Registrar a list in duplicate, in the form in Rule 13, of the papers,

other than those inserted in the appellant's lists and relevant to the subject-matter of the appeal, to which such respondent desires that reference shall be made by the Court at the hearing of the appeal, and which shall be inserted in the Paper-book at such respondent's expense. Such list shall be termed "The Respondent's List."

21. The Deputy Registrar shall, within fourteen days after the delivery by the Appellant and the Respondent of their lists respectively, make and deliver to such Appellant and to such Respondent separate estimates of the cost of preparing their portions of the Paper-book. Every estimate for the cost of the preparation of the Paper-book shall include the cost of transcribing, translating and printing, etc., the documents marked \* in Rule 11 above.

22. The Appellant and Respondent respectively shall deposit with the Accountant of the Court the amounts due on the estimates served under Rule 21 within the times here specified :—

(a) The amount due for estimating, translating and examining translations, after (in the case of the Appellant) deducting the amount of the initial deposit made under Rule 29 (1), Chapter V within four weeks of the service of the estimate, and

(b) The whole of the remainder within eight weeks of the service of the estimate.

23. If the respondent considers that any paper or portion of a paper which ought to have been inserted in the appellant's lists under the provisions of Rule 14, has been omitted therefrom in violation of these provisions, he may, within one week after service upon him of the notice required by Rule 18 and after giving notice to the appellant of his intended application, apply to the Registrar for an order that such paper or portion of a paper be inserted in the Paper-book of the case at the cost of the appellant.

24. If one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, and the Registrar allows the document to be included, the lists shall clearly indicate the fact that, and the party by whom, the inclusion of the document was objected to.

25. The Registrar, as well as the parties and their legal agents, shall endeavour to exclude from the Paper-book all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the appeal, and generally, to reduce the bulk of the Paper-book as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents.

Note (1)—Ordinarily, a long series of documents, such as accounts, rent-rolls, inventories, etc., should not be printed in full; but the parties or their legal agents should agree to short extracts being printed as specimens.

Note (2)—Unless the Registrar shall otherwise direct, documents produced before the Court of first instance but not admitted in evidence shall not be included in the Paper-book. An Advocate desiring to refer to any such document at the hearing of the appeal before the High Court shall, at any time before the hearing, serve on the Advocate for the Opposite party a typed copy or a typed copy of the translation as the case may be, of any such document to which he desires that reference should be made, and shall also provide a such typed copies or typed copies of the translations for the use of the Court. If he fails to do so he shall not refer to such document at the hearing and no adjournment of the appeal will be granted on this account unless the Court otherwise directs.

26. The appellant's and respondent's lists shall each bear a certificate under the hand of the Advocate for such appellant or respondent in the following forms:—

I, A. B., Advocate for \_\_\_\_\_, do hereby certify that I have carefully examined this list with reference to the provisions of Rule 25, Chapter IX of the Appellate Side Rules, and declare that in my judgment it is necessary to include in the Paper-book of the appeal every document, or portion of a document, included in the list in order to arrive at a proper decision of the appeal.

27. If the respondent do not enter an appearance, or do not deliver the list directed by, and within the time prescribed by, Rule 20, and if no order be made under Rule 23, the Paper-book shall be prepared in accordance with the appellant's lists.

28. When two or more appellants or respondents have the same interest in the appeal, one set of lists only shall be required from all such appellants or respondents. Appellants or Respondents having separate interests shall deliver separate sets of lists. In such cases the principle of Rule 32 shall apply.

29. If any of the papers which must be inserted in the appellant's list or in the respondent's list, was previously printed in a former Paper-book, the fact of its having been so printed must be stated in the list in which such paper is inserted. Such papers shall not be printed unless the Registrar otherwise directs.

30. No paper in the record of the case, which is not inserted in the appellant's or respondent's lists, or ordered to be included in the Paper-book under Rule 23, and printed in the Paper-book

of the case or in a previous Paper-book, shall be referred to at the hearing of the appeal without the special leave of the Court. But this rule shall not preclude the Court from referring to any paper to which it considers a reference necessary for the ends of justice.

31. If it subsequently appears that the amount deposited by either party to the appeal is insufficient to defray the cost of preparing his portion of the Paper-book, or a supplementary Paper-book after remand, the Deputy Registrar shall estimate the additional amount required and shall give notice thereof to such party. Such additional amount shall be deposited by such party with the Accountant of the Court within two weeks after service upon him of such notice. No work in the matter of the preparation of the Paper-book, which is likely to cost more than the sum deposited should ordinarily be undertaken until such additional deposit has been made, unless the Registrar shall otherwise direct.

32. When separate appeals have been preferred by different persons against the same decree, complete lists of the documents which the parties wish to include in the Paper-book shall be delivered by the parties to each appeal. Common matter shall appear in one Paper-book only, the other Paper-books containing references to the pages of the Paper-book in which such common matter appears. In such cases the Deputy Registrar shall, subject to the order of the Registrar, apportion between the parties concerned the cost of preparation in respect of matter common to all or any of the parties. The estimates for the cost of the preparation of Parts I and II of the Paper-books in such cases shall not be served on the parties until such apportionment has been made. This rule shall also apply when two or more separate appeals are preferred in analogous cases.

33. If the appellant fails to deliver his lists of papers in accordance with Rule 16, or if the appellant or respondent fails to make the deposit or additional deposit, required by Rules 22 and 31, respectively, the Deputy Registrar shall lay the matter before the Registrar, who may, in case of default by the appellant, cause the appeal to be set down for hearing; and the Court may, unless satisfied that there was reasonable ground for the default, direct the appeal to be dismissed for want of prosecution; or may pass such other order as may seem proper in the circumstances of the case.

34. The appellant shall, simultaneously with depositing the money referred to in Rule 22(a) above, file with the Deputy Regis-

trar a declaration stating the name of the Advocate by whom his Paper-book will be prepared, either in accordance with Rule 45 or with Rule 49.

The Deputy Registrar shall thereupon make over one of the respondent's duplicate lists to the Advocate so named, giving the respondent notice thereof.

35. (a) Such Advocate shall be afforded all reasonable access to the original record in order to enable him to make transcripts of the papers and do other acts necessary to the preparation of the Paper-book, but he shall not be entitled to remove such original record from the office of the Deputy Registrar. Certified transcripts of the papers shall be furnished to him, if he so desire, upon payment of the usual rates.

(b) Such Advocate shall himself deal with the original records made over to him, and is hereby prohibited from entrusting them to the care of any other person. For the purpose of translating and copying documents, in any case, he alone will be permitted to have access to the original record of such case.

(c) Such Advocate shall be permitted to utilize the services of one reader or muharrir to assist him in such work. He must, however, himself be present and continuously in possession of the record, and on his leaving the office, the record must be returned to the officer of the Court in charge, and the work of preparing the Paper-book must at once cease, the reader or muharrir leaving with his employer.

(d) In the case of any Paper-book in which a map has to be inserted such Advocate shall be allowed to utilize also the services of a draftsman, who will be allowed access to the record on the same terms as the reader or muharrir.

36. Any Advocate who has practised in the High Court for a period of three years, or who has practised in a Mufassal Court for not less than three years and in the High Court for not less than one year, shall be entitled to prepare a Paper-book under these rules.

Provided that a Division Court, on being satisfied, either on the report of the Registrar or otherwise, that any Advocate has been negligent, incompetent or careless in the preparation of a Paper-book, may disqualify such Advocate from preparing Paper-books for such period as to it may seem proper.

37. An Advocate duly authorised to prepare a Paper-book shall be required to make a declaration in writing to the effect that he will himself do the translation work, and, in the case of an

Appeal valued under Rs. 10,000, that the editing will be done either by himself or under his direct supervision.

38. Paper-books in Appeals from Original Decrees must be made ready and filed with the Deputy Registrar within the following limits of time from the date when the deposits required to be made by the appellant under Rule 22 (a) above are made, viz.,

(a) when the Paper-book is estimated by the Deputy Registrar to consist of not more than 100 pages—within six weeks;

(b) when the Paper-book is estimated by the Deputy Registrar to consist of more than 100, but not more than 200 pages—within two months;

(c) in any other case—within four months.

39. The time within which the examination of translations should be completed is as follows :—

In the case of Paper-books falling within clause (a) of Rule 38—two weeks.

In the case of Paper-books falling within clause (b) of Rule 38—three weeks.

In the case of Paper-books falling within clause (c) of Rule 38—one month.

On the completion of the examination of the translations, but not before, and provided that the translations have been properly done and accepted, the Advocate preparing the Paper-book shall be entitled to withdraw the amount due to him for such translations.

On the Paper-books being filed, they shall be taxed, and it will be the duty of the Taxing Officer to see that they have been prepared in conformity with these rules.

It shall be the duty of the Examiners of Translations to report through the Taxing Officer to the Registrar any case in which the translations have been carelessly, negligently or imperfectly done, and it shall be the duty of the Taxing Officer to report to the Registrar any case in which the preparation of any other portion of the Paper-book has been carelessly, negligently or imperfectly done. The Registrar, if he thinks fit, will report any such matter to the Court, who may take action under the proviso to Rule 36, and may either in addition to or without taking such action, direct that the whole or any portion of such funds as are lying in the Court to the credit of the account of the Paper-book concerned be withheld from the Advocate in question, and may pass orders for the disposal of the funds so withheld.

When the Taxing Officer is satisfied that the Paper-book has

been properly prepared, he shall certify accordingly, and upon such certificate being granted, but not before, the balance of the amount due to the Advocate concerned shall be paid to him on application.

40. When a case is ready for hearing, the Deputy Registrar shall furnish the Advocates engaged on either side with the copies to which they are entitled under Rule 48 or Rule 52. The issue of the Paper-books to the Advocates will be notice to them that the case is ready for hearing.

41. The endorsement on every Paper-book prepared for the use of the High Court at the hearing of the appeal shall furnish the following information :—

- (a) the number of the cause ;
- (b) the name of the Judge of the Court below,
- (c) the names of the parties and their Advocates ;
- (d) the date of the institution of the suit ;
- (e) the date of the Lower Court's judgment ;
- (f) the date on which the appeal was filed ; and
- (g) the date on which the appeal was heard.

42. In appeals in which the respondent shall not have appointed an Advocate up to the date of the preparation of the Paper-book, an appendix containing the deposition of the serving officer and the return and the remarks of the lower Court as to the service shall be added to the Paper-book either in transcript or translation, according as they may be in English or in the vernacular.

43. The supplementary Paper-book after the receipt of finding of a lower Court in a case referred under Order XLI, Rules 25 and 27, Civil Procedure Code, shall be governed by the rules of this Chapter.

44. Notwithstanding anything contained in these rules, unless the Registrar shall otherwise direct, in appeals below Rs. 5,000 in value in which it appears that if Parts I and II of the Paper-book were printed, the total number of pages contained in the Paper-book would be 20 or less, 12 typed copies of the Paper-book shall be prepared at the cost of the Appellant. In such cases, the Appellant and the Respondent, if the latter enters appearance, shall be entitled to have, free of charge, as many copies of the Paper-book, not exceeding four on either side, as they may have Advocates engaged in the appeal. In any case, they shall each be entitled to two copies. Additional copies over and above those which may be supplied to the parties free of charge, under this rule shall be charged for.



## B—APPEALS FROM ORIGINAL DECREES VALUED

UNDER RS. 10,000.

45. Paper-books in all appeals valued under Rs. 10,000 shall be prepared by an Advocate duly authorised to act for the Appellant, subject to the translations being examined by a panel of examiners appointed by the Court.

Such Paper-books must be prepared within the period specified in Rule 38 but in calculating the said period the time actually taken in examining the translations shall be deducted.

46. The estimates for the preparation of the Paper-books in such appeals shall state separately the cost of translating, editing, printing, etc., at the following rates :—

(a) estimating at 10,000 words per rupee ;

(b) translating at 150 vernacular words per rupee, three figures being counted as one word ;

(c) examining translations at 300 vernacular words per rupee, three figures being counted as one word ;

(d) copying at the rates specified in Chapter XIII ;

(e) editing the Paper-book at eight annas a page if it is printed, and at five annas a page if it is typed ;

(f) lithographing, drawing or tracing maps (where necessary)—actual cost ;

(g) printing fee for 24 copies—

Ordinary matter (without marginal notes)—Actual cost, not exceeding Rupee 1-2 per page.

Tabular matter—Actual cost.

Note—(1) The above rates are liable to alteration.

(2) The charge for editing includes the charge for indexing if the Paper-book is printed and that for stationery if the Paper-book is typed.

(3) If the document to be translated is in any language other than the vernaculars of Bengal and Assam, a special rate may be fixed by the Registrar.

(4) Each item of cost in the preparation of the Paper-book at the rates specified above should be calculated to the nearest anna (fraction below half an anna being omitted and half an anna or over being reckoned as one anna).

47. The Paper-book for the use of the High Court in such appeals shall be printed and edited in accordance with the following directions :—

(i) The printed Paper-book shall consist of two parts in the same volume, where practicable, *vis.*, Part I and Part II. Part I.

shall contain the record of the proceedings in the Lower Court, and shall include all the papers mentioned in rule 11. These should be printed strictly in chronological order, that is, in the same order as the index. Part II shall contain the exhibits and documents relevant to the subject-matter of the appeal which should be arranged in the manner prescribed in Rule 15, each document to show its exhibit mark and whether it is a plaintiff's or defendant's document (unless this is clear from the exhibit mark). Each part should be paged at the foot of each page. The heading to each document should consist of the number or exhibit mark and the description of the document in the index with the date, and the corresponding English date must be given if the document bears any other date.

(ii). The index of Part I shall be in chronological order and shall be placed at the beginning of the volume. The index to Part II shall follow the order of the exhibit mark, and shall be placed immediately after the index to Part I. The documents in Part I should be numbered consecutively, while those in part II should not be numbered apart from the exhibit mark. The index should contain a correct and full description of each document and references to the pages in the printed Paper-book. Whenever any document included in Part I or Part II of the Paper-book is dated according to Bengali fashion the corresponding English date of such document must be entered in the index.

(iii) All papers which are not in English shall be translated into that language. Such translation and the original English papers shall be arranged and printed in Parts I and II in the order prescribed by the first sub-clause of this rule.

(iv) Maps forming part of a Paper-book shall be included in the index, but shall not be bound up with the other papers in the Paper-book. Such maps shall be drawn or printed on durable paper and they shall form a separate packet with a separate list.

Translations of vernacular phrases or figures that form part of a map must be submitted on a correct tracing of the map in question.

43. There shall ordinarily be printed 24 copies of the Paper-book, but the Registrar may, when necessary, direct a larger number to be printed. The appellant and respondent shall be entitled to have, free of charge, as many copies as they have Advocates

engaged in the appeal. In any case they shall each be entitled to three copies.

C—APPEALS FROM ORIGINAL DECREES VALUED AT RS. 10,000  
OR OVER.

49. Paper-books in all Appeals valued at Rs. 10,000 or over shall be prepared by an Advocate duly authorised to act for the Appellant subject to the translation being examined by a panel of examiners appointed by the Court and the Paper-book being edited by the Court's staff of Editors.

Such Paper-books must be prepared within the period specified in Rule 38 but in calculating the said period the time actually taken in examining the translations shall be deducted. Delay on the part of Editors will be no excuse for extending the time unless the same has been promptly and duly reported to the Registrar and his orders obtained.

50. The estimate for the preparation of the Paper-books in such Appeals shall be prepared in accordance with the particulars in Rule 46 above, except that—

(i) For "eight annas" in clause (e) should be read "ten annas."

(ii) For "24 copies" in clause (g) should be read "64 copies".

(iii) For "Rupee 1-2 per page" in clause (g) should be read "Rupee 1-6 per page."

51. Paper-books for the use of the High Court in such Appeals shall be printed and edited in accordance with the directions in Rule 47 above, with the additional direction that the printing of each separate document and exhibit shall begin on a separate sheet.

52. There shall ordinarily be printed 64 copies of the Paper-book, but the Registrar may, when necessary, direct a larger number to be printed. The appellant and respondent shall be entitled to have, free of charge, as many copies as they have Advocates engaged in the appeal. In any case they shall each be entitled to three copies.

53. On receipt of the printed Paper-books 40 copies thereof shall forthwith be kept in safe custody in the record-room for use in the event of an appeal to the Privy Council. Of the remainder, 10 copies should be retained for use in the High Court.

## Part III—Appeals from Appellate Decrees.

54. Paper-books in all Appeals from Appellate Decrees will consist of the following papers :—

- (a) The judgment of the first Court.
- (b) The judgment of the lower appellate Court.
- (c) Any judgments or order of remand passed in the case either by the lower appellate Court in appeal or by the High Court on Second Appeal.

(d) The memorandum of Second Appeal.

(e) A front leaf containing the number of the cause ; the names of the Judges of the two Courts below ; the names of the parties and of their Advocates ; the date of the institution of the suit ; the date of the judgment of the first Court ; the date of the judgment of the Lower Appellate Court ; the date on which the appeal was filed and the date on which the appeal was heard.

Note (1)—The Advocate for the Appellant shall, before the hearing of the appeal, serve on the Advocate for the Respondent a typed copy or a typed copy of the translation, as the case may be, of any document upon the construction of which he considers the determination of the appeal depends, and shall also provide two such typed copies or typed copies of the translation for the use of the Division Court. If he fails to do so, he shall not refer to such document at the hearing, and no adjournment of the hearing of the appeal will be granted on this account, unless the Court otherwise directs.

Note (2)—If, in any Second Appeal, the Bench at the time of the preliminary hearing under Order XLI, Rule 11, Civil Procedure Code, or the Advocate for the Appellant desires that translations of the plaints, or written statements should be prepared, the Advocate for the Appellant shall, before the hearing of the appeal, serve on the Advocate for the respondent typed copies of the translations of such plaints or written statements, and shall also provide two such typed copies for the use of the Division Court.

55. Except as otherwise provided in these rules, in each case of Second Appeal (including appeals under Chapter X of the Bengal Tenancy Act), the Registrar shall cause to be prepared, at the cost of the appellant, twelve printed copies of the Paper-book as aforesaid.

56. In the case of Appeals from Appellate Decrees not exceeding Rs. 50 in value, other than appeals under Chapter X of the Bengal Tenancy Act, the Registrar shall cause two typed

copies of the Paper-book as aforesaid to be prepared for the use of the Judges and no charge shall be levied from the parties on account of the preparation of such Paper-book.

57. In the case of Appeals from Appellate Decrees exceeding Rs. 50 in value including appeals under Chapter X of the Bengal Tenancy Act, the appellant shall be entitled to have, free of charge, two copies, and the Deputy Registrar as guardian *ad litem* of a minor respondent one copy, of the printed Paper-book.

58. No work in the matter of the preparation of the Paper-book shall be undertaken until the deposit required under the provisions of Rule 29 (a), Chapter V, has been made, unless the Registrar shall otherwise direct.

59. In case of the appellant failing to make the necessary deposit under Rule 29 (a), Chapter V, the Deputy Registrar shall lay the matter before the Registrar who may at once cause the appeal to be set down before the Division Court to which it belongs; and if the appellant does not satisfy the Court as to his delay, his appeal may be dismissed for want of prosecution, or the Court may pass such other order as it may deem proper.

60. Additional Paper-books over and above those which may be supplied to the Advocate for the appellant, free of charge, under these rules shall be charged for at the rate of six annas a page for each additional Paper-book supplied to him, subject to a maximum additional charge of Rs. 7-8, for each such Paper-books. Similarly, copies of the Paper-book may be supplied to the Advocate for the Respondent on payment of the sum of 6 annas a page per Paper-book, subject to a maximum charge of Rs. 7-8 for each such Paper-book.

61. When the case is ready for hearing, the Deputy Registrar shall furnish the Advocates engaged on either side with copies of the Paper-book, for which deposit shall have been made as aforesaid. The issue of Paper-books to the Advocates will be notice to them that the case is ready for hearing,

62. In cases governed by one judgment, the Registrar, on application, may make a special order.

As regards Paper-books required by the Advocate for the respondent or additional Paper-books required by the Advocate for the appellant in the case of analogous appeals, the Registrar, in making an order as to the payment of the costs for the preparation of such Paper-books shall be guided by the principle laid down in Rule 60 above.

## Part IV—Appeals from Orders.

63. The rules for the preparation of Paper-books in Appeals from Original Decrees valued under Rs. 10,000 or valued at Rs. 10,000 or more, shall apply, respectively, to every First Appeal from an order of the like value, (including an Order under Section 47, Civil Procedure Code), passed by a Subordinate Court, not being an order under Order XLI, Rule 23 of the same Code with the following modifications viz—

(A). That for the papers mentioned in Rule 11 of Part II as forming part of Part I of the Paper-book, the following shall be substituted :—

\*(a) the order sheet ;

\*(b) the application or proceeding on which the order appealed from was passed ;

\*(c) the petition, if any, filed in answer ;

(d) the evidence, oral or documentary, which may have been taken or put in with reference to the application or proceeding and which is necessary for the decision of the appeal ;

\*(e) the order appealed from :

(f) any other papers to which reference may be necessary for the decision of the appeal ;

\*(g) the memorandum of appeal.

(B). That Lists 'A' and 'B' shall be delivered to the Deputy Registrar by the Appellant within one week after service of the notice of the arrival of the record.

64. (1) In Second Appeals from Orders (including Orders under Section 47, Civil Procedure Code), irrespective of the value of such appeals, and in appeals from Remand Orders under Order XLI, Rule 23 of the same Code, in which the valuation of the appeal does not exceed Rs. 50, the Paper-book shall consist of—

(a) the judgment or judgments of the lower Court or Courts ;

(b) the memorandum of appeal to the High Court.

(2) The Registrar shall cause two typed copies of the Paper-book as aforesaid to be prepared.

(3) No charge shall be levied from the parties for the preparation of the Paper-book.

65. In appeals from Remand Orders under Order XLI, Rule 13, Civil Procedure Code, in which the valuation of the appeal exceeds Rs. 50, the Paper-book shall be prepared and supplied to the parties in accordance with the rules relating to the preparation of Paper-books in Appeals from Appellate Decrees in which the valuation of the appeal exceeds Rs. 50.

## REVIEWS.

The Bengal Tenancy Act by Rai Surendra Chandra Sen Bahadur ; seventh edition by Hemendra Chandra Sen, M. A., B. L. ; published by M. C. Sarkar and Sons, 15 College Square, Calcutta. Price Rs. 14.

This is the seventh edition of this deservedly popular commentary on the Bengal Tenancy Act which has long been the *vade mecum* of the Bench and the Bar on the intricate problems of the Tenancy Laws. This edition incorporates the extensive amendments which have been recently made by the Amending Act of 1928, and the learned editor has added extremely helpful notes and commentaries on the new sections, not forgetting to note likewise the several slipshod errors that have crept into the latest amendments of the Act. The notes are clear, accurate and precise and help greatly to fix upon the essential points in the new amendments. Reference may, for instance, be made to the sections relating to the transferability of occupancy holdings at p. 250 *et seq.*

The Bengal Tenancy Act is one of the most inartistic pieces of legislation ever turned out by the legislature. The complicated land system of Bengal and the extremely complex system of administration connected with it easily lend themselves to confusion in any attempt to deal with them. Matters have been made worse by piecemeal amendments made from time to time, not always with due regard to demands of elegance. When a comprehensive amendment of the Act was undertaken one might possibly expect that these incongruities and intricacies would be simplified. Hardly any attempt however has been made in that direction and nothing like an attempt to recast and overhaul the law has been made. On the contrary, a confusingly large number of amendments passed, with very inadequate regard to consistency and system have helped to make "confusion worse confounded". The learned editor of this volume has pointed out several errors and incongruities in the law which, more or less lie on the surface. Those who have charge of the administration of the law have already discovered a great many others and may be trusted to find out heaps of other difficulties as time goes.

Into the intricate mass of statute law and case law Mr. Sen's book has long been a safe guide with whom one might be possibly

puzzled by the great intricacies of the by-ways of the law but one ran no risk of losing his way for want of light. The present edition by his nephew maintains the credit of this old work, not the least in respect of comprehensiveness which was one of the outstanding merits of the work. The late author made a steady endeavour to make his work a complete manual of the rent law and as time went on he had added to his work an enormous mass of connected material which might have to be referred to in connection with the administration of the law. Following the same lines, the present editor has incorporated all new matters including rules under the Bengal Tenancy Act, instructions to Registration officers regarding transmission of landlord's fees, price lists and other things. The result is that the work has really become a complete guide to the rent law of the two provinces.

One could only wish that the index to the work were more helpful. It is comprehensive but it might be more systematic. We may point out that alphabetical arrangement of the sub-headings which is usually followed in indexes, is a most helpful thing and its absence has not helped to advance the value of the book to busy lawyers.

**The Law of Fixtures in British India** by Manmatha Nath Ray, M.A., B.L.; published by the Calcutta University, 1928.

This is the author's thesis for the Onanth Nauth Deb Prize and is a praiseworthy attempt to clarify the law of fixtures in British India by reference to history and principle. The author deals in the first place with the law of fixtures in India under Hindu and Mahomedan law and then with the English law of Fixtures and its influence on the law prior to the T. P. Act. In the following Chapters he deals with the law as it now stands under the Transfer of Property Act and judicial decisions. His observations are accurate and precise. His references to case-law are both adequate and judicious. In tracing the evolution of the law he has mostly spoken through quotations from judgments which have been selected with care and judgment.

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## NOTES OF CASES.

I.L.R. 53 Bom. 339.

1928.

Emperor

v.

Haji Nur Mahomed.

*Complaint before a Magistrate—Cognizance of the offence by the Magistrate—Investigation by Police—Charge sheet by Police after investigation—Charge sheet void.*

In this case a complaint was made to the Chief Presidency Magistrate that the three accused had committed offences under Secs. 411 and 114, Indian Penal Code. The Magistrate took cognizance of the offence against accused Nos. 1 and 2 under Sec. 200 Criminal Procedure Code and after examining the complainant directed an inquiry and investigation to be made by the Police under Sec. 202, Criminal Procedure Code. The Police officer concerned made no report and sent up a charge sheet charging the two accused under Secs. 411 and 114. A question arose whether when a Magistrate has referred a complaint for investigation under Sec. 202, the Police are entitled after investigation to arrest the accused and send him up for trial under a charge sheet as if they had taken cognizance of the case under their ordinary powers of investigation.

Held (*per Mirza and Baker, JJ.*), that when a Magistrate has referred a complaint for investigation under Sec. 202, Criminal Procedure Code, the Police are not entitled, after investigation, to arrest the accused and send him up for trial on a charge sheet. The only action they can take is to make a report to the Magistrate.

# The Calcutta Law Journal.

VOL. L.

CALCUTTA, 16TH AUGUST, 1929.

No. 4.

## NEW HIGH COURT RULES.

### (1) *Habeas Corpus Applications.\**

The following rules are hereby made with effect from the 1st day of August 1929 by the High Court of Judicature at Fort William in Bengal in exercise of the powers vested in it by sub-section (2) of section 491 of the Code of Criminal Procedure.

1. Rules 1 to 24 inclusive of Chapter XXXVIII of the rules of the High Court, Original Side, and Forms 2 to 6 (inclusive) in Appendix N to the said rules are hereby repealed and the remaining rules of the said Chapter are renumbered accordingly.

2. After rule 29 of Chapter XI of the rules of the High Court, Appellate Side, the following shall be added:—

E.—Applications under section 491 of the Code of

### Criminal Procedure.

30. All applications for orders under clauses (a), (b), (c), (e) and (f) of section 491 of the Code of Criminal Procedure shall be made before the Division Bench taking the criminal business of the Appellate Side of the High Court.

31. Such applications shall be made by Advocates and Attorneys may instruct such Advocates.

32. Applications for orders under clauses (a), (b), (c), (e) and (f) of section 491 of the Criminal Procedure Code shall be made on petition duly verified by affidavit setting forth the circumstances under which the order is sought.

33. Where the application is for an order under clause (e) it shall be stated where the prisoner is detained and for what purpose his evidence is required.

34. When an order under clause (d) is required the pro-  
pound

\*Calcutta Gazette, July 25, 1929—Part I, p. 1510.

ing officer of the Court martial or the presiding officer acting under the Commissioner from the Governor-General in Council may send an application to this Court in writing and in such case an affidavit shall not be required. The application shall be in the form of a letter addressed to the Registrar, stating the purpose for which the said Court-martial has been assembled or the authority under which the said Commissioners are acting, and also stating where the prisoner is detained in custody and when, where and for what purpose he is required to be produced. It shall be the duty of the Registrar to submit the letter as soon as possible after the receipt thereof to, and to obtain the order thereon of, the Judges presiding over the Criminal Appellate Bench of this Court.

35. Where the application is for an order under clause (e), notice of the application shall be served on the prisoner and it shall be stated in the affidavit where the prisoner is detained in custody, to what other custody it is proposed to remove him and the reason for such change of custody.

36. Where the application is for an order under clause (f), the Sheriff's return of *capicorpus* to the warrant of arrest shall be produced. The officer having the custody of the Sheriff's return shall cause the same to be produced before the Court on a requisition to him in writing.

37. In any case in which the Court shall order a person in custody to be brought either before it, or before a Court-martial, or before Commissioners acting under the authority of a commission from the Governor-General in Council, or to be removed from one custody to another, a warrant shall be prepared and signed by the Registrar of the Appellate Side, and sealed with the seal of the Court.

38. Such warrant where issued under rule 34 shall be forwarded by the Registrar of the Appellate Side to the officer in charge of the jail in which the prisoner is confined; in every other case the warrant shall be served personally upon the person to whom it is directed or otherwise as the Court shall direct.

39. Where the application is to bring up before the Court a person in custody under a warrant to detain such person, a copy of the warrant under which he is detained, obtained from and authenticated by the signature of the person in whose custody the applicant is, shall be produced to the Court, or it shall be shown by affidavit that it has been asked for and denied.

40. Where the Court is of opinion that a *prima facie* case for granting the application is made out, a rule *nisi* may be issued calling upon the person or persons against whom the order is sought to appear on a day to be named therein to show cause why such order should not be made and at the same time to produce in Court the body of the person or persons alleged to be illegally or improperly detained then and there to be dealt with according to law.

41. On the return day of such rule or on any day to which the hearing thereof may be adjourned, where no cause is shown, or where cause is shown and disallowed the Court shall pass an order that the person or persons improperly detained shall be set at liberty or delivered to the person entitled to their custody. Where cause is allowed the rule shall be discharged.

42. In disposing of any such rule the Court may in its discretion make an order for the payment by one side or the other of the costs of the rule.

43. The forms of warrants at the end of this Chapter shall be followed.

3. The following forms shall be inserted at the end of Chapter XI aforesaid :—

*Form of Warrant.*

(Chapter XI, Rule 43.)

In the High Court of Judicature at Fort William  
in Bengal.

Appellate Criminal Jurisdiction.

To the officer in charge of (name of jail or lunatic asylum or other place, where the person is detained in custody) or to (name of person.)

You are hereby required to have the body of B.C., now a prisoner in your custody (or now in your custody before the High Court, on its Appellate Side on the

next, by of the clock in the forenoon of the same day, to be dealt with according to law and you shall then and there abide by such order as shall in that behalf be made by the said Court (If the prisoner is detained in public custody add) and unless the said B.C. shall then and there by the said Court, be ordered to be released, you shall, after the said Court shall have dispensed with his further attendance, cause him to be conveyed, under safe and sure conduct, back to the said (jail or asylum or other place of custody).

Dated this day of

19.

Assistant Registrar.

*Form of Warrant.*

(Chapter XI, Rule 43.)

In the High Court of Judicature at Fort William in Bengal.

Appellate Criminal Jurisdiction.

To the officer in charge of the (name of Jail), or of the (name of asylum), or to (name of officer) in charge of B.C., an alleged lunatic.

You are hereby required to have the body of B.C., now a prisoner in the (name of jail) or now in custody at the (name of jail) or now in custody at the (name of asylum) or now in your charge, under safe and sure conduct, before the High Court, on its Appellate Side, on the            day of            next, by            of the clock in the forenoon of the same day, there to be dealt with according to law, and unless the said B.C. shall then and thereby the said Court be ordered to be discharged, cause him, after the said Court shall have dispensed with his further attendance, to be conveyed, under safe and sure conduct, back to the said jail (or asylum or other custody).

Dated this            day of            19.

Assistant Registrar.

*Form of Warrant.*

(Chapter XI, Rule 43.)

In the High Court of Judicature at Fort William in Bengal.

Appellate Criminal Jurisdiction.

To the officer in charge of the (name of jail).

You are hereby required to have the body of B.C., now a prisoner in the (name of jail) under safe and sure conduct, before the High Court, on its Appellate Side, on the            day of            next, by            of the clock in the forenoon of the same day, there to give testimony in a certain charge or prosecution now pending before the said Court against D.E. and after the said B.C. shall then and there have given his testimony before the said Court, or the said Court shall have dispensed with his further attendance, cause him to be conveyed, under safe and sure conduct, back to the said (name of jail).

Dated this            day of            19.

Assistant Registrar.

*Form of Warrant.*

(Chapter XI, Rule 43.)

In the High Court of Judicature at Fort William in Bengal.

Appellate Criminal Jurisdiction.

To the officer in charge of the (name of jail).

You are hereby required to have the body of B.C., now a pri-

soner in the (name of jail), under safe and sure conduct, before the officers assembled at a Court-martial (or before the Commissioners acting under the authority of a commission from the Governor-General in Council), at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ next, by \_\_\_\_\_ of the clock, in the forenoon of the same day, for the trial of the said B. C. (or there to give testimony in a certain trial now pending before the said Court-martial or the said Commissioners against D.E., or as the case may be) and after the trial of the said B.C. or after the said B.C. shall then and there have given his testimony before the said Court-martial (or the said Commissioners) or the said Court-martial (or the said Commissioners) shall have dispensed with his further attendance, cause him to be conveyed, under safe and sure conduct, back to the said (name of jail).

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19.

Assistant Registrar.

*Form of Warrant.*

(Chapter XI, Rule 43.)

In the High Court of Judicature at Fort William in Bengal.  
Appellate Criminal Jurisdiction.

To the officer in charge (name of jail).

You are hereby required to cause the body of B. C., now a prisoner in the (name of jail), to be conveyed, under safe and sure conduct, to the jail at \_\_\_\_\_ and on or before the \_\_\_\_\_ day of \_\_\_\_\_ made over to the officer in charge of such jail, to be by him there kept in intermediate custody for the purpose of trial before the High Court, in the exercise of Appellate Criminal Jurisdiction at its next sittings to be held at (name of place).

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19.

Assistant Registrar.

(2) *Addenda to High Court Appellate Side Rules\**

In rule 53, Chapter IX (revised) insert the words "and the Deputy Registrar as guardian *ad litem* of a minor respondent one copy" between the words "two copies" and "of the printed, in line 4.

In rule 61, *ibid.*, insert the words "and supplied to the parties" between the word "prepared" and the words "in accordance with the rules" in line 4.

\* Calcutta Gazette, July 25, 1929—Part I, p. 1512.

(3) *Revised Rules for the training of Legal Practitioners  
in the Subordinate Courts.\**

1. On and after the 1st January 1930, no person shall be admitted as a Pleader in the Courts subordinate to the High Court, unless he has served as a probationer for a period of one year, either at the head quarters of a district or in one of the subdivisions thereof, in conformity with the following rules, or is not eligible thereunder, or has not satisfied the requirements thereof.

2. Any person, who has obtained the degree of Bachelor of Law of one of the Universities of Calcutta, Dacca, Madras, Bombay, Patna, Allahabad and the Punjab, or of the Muslim University of Aligarh, or of the Benares Hindu University, shall be enrolled as a probationer, provided that his application to serve as a probationer be made within one year from the date of his obtaining such degree, or within such further time as the High Court may for special reason allow, and provided that a Bachelor of Law of the University of Madras, Bombay, Allahabad, and the Punjab, of the Muslim University of Aligarh and of the Benares Hindu University so applying has passed an examination held under the direction of the District Judge in reading, writing and speaking the vernacular of the district in which he intends ordinarily to practice.

NOTE.—The period of one year referred to in this rule shall count from the date of the applicant's diploma.

3. The application mentioned in the last foregoing rule shall be addressed to the District Judge of the district in which the applicant desires to practise, and it shall specify the Pleader with whom and the Court in which the applicant desires to serve as a probationer, and shall be accompanied by a certificate from the Pleader stating that he is willing to take the applicant as a probationer: Provided that no Pleader who is not a practising Pleader of more than five years' standing, or does not ordinarily practise at the headquarters of a district, or in one of the subdivisions thereof shall be eligible to take a probationer, and no Pleader shall be permitted to entertain more than one probationer at one time; and provided also that permission shall not be granted to serve as a probationer in any Court which is not at the headquarters of a district or of a sub-division thereof.

4. On receipt of the application mentioned in the last fore-

\*Calcutta Gazette, June 21, 1928—Part I, p. 1357.

going rule, and if it is in order, the District Judge to whom it has been made shall grant the permission applied for and shall cause the particulars to be entered in a register to be kept in his office.

5. The applicant shall then, during and for a period of one year, serve as a probationer with the Pleader and in the Court in respect of whom and which the said permission has been granted.

6. During the period of probation aforesaid, the probationer shall work with the Pleader in and outside Court. Such work shall be limited to acting only, and shall not extend to pleading, and the general nature thereof shall be that of assisting the Pleader in his professional work as Pleader.

7. During the period of probation aforesaid, the probationer shall also attend the Court regularly and shall notify his attendance therein daily to such officer as the District Judge in the case of service at the headquarters of a district, or the Senior Munsiff in the case of service at the headquarters of a sub-division, may appoint for the purpose. It shall be the duty of such officer to note the attendance of the probationer in a register to be kept for the purpose.

8. The probationer shall ordinarily work with one and the same Pleader throughout the period of his probation, and the Pleader shall ordinarily be one in continuous practice throughout such period. In case where necessity may arise, the service may be with different Pleaders for successive periods, but the total period of probation must in no case be less than a year, and no such service shall be recognised, unless it has been with the permission of the District Judge, obtained previously and in the manner indicated in rules 3 and 4 above.

9. During the period of probation aforesaid, the probationer may be excused absence for a portion or portions thereof provided the Pleader with whom or the Court in which the probationer is to serve is satisfied that there is good cause for such absence and that the training of the probationer will not materially suffer therefrom. In any other case, the deficiency will have to be made up by serving for such further period, not longer than the actual period of absence, as may be necessary in the opinion of the Pleader or of the Court as the case may be.

10. A Pleader who is permitted to take a probationer will be allowed to charge a fee of Rs. 50 for his remuneration for the training he gives to the probationer, and may refuse to give a certificate of his willingness to take the probationer unless he receives the same in advance. In case, however, of the Pleader not being



able to retain the probationer for the full period of probation with him, the probationer will be entitled to a refund of an amount in proportion to the uncompleted portion of the service with such Pleader.

11. Every probationer shall, during the whole period of his probation, be exclusively employed by the Pleader in his proper business and practice as such.

12. On completion of the period of probation as aforesaid, the probationer shall file with the District Judge a certificate in Form A of the Schedule from the Pleader and a certificate in Form B of the Schedule from the Judge of the district or the Senior Munsif in the subdivision as the case may be, along with his application for admission as a Pleader mentioned in the next rule: Provided that the Judge of the district or the Senior Munsif of the subdivision, should he entertain a doubt as to whether the probationer has diligently worked as such, may, before giving such certificate, subject the probationer to an examination as regards procedure, and should he not be satisfied as a result of that examination that the probationer has served with diligence, may direct him to continue as a probationer for a further period not exceeding three months.

[Then follows rule 13, *et seq.*, at page 6, Chapter XI (revised), Volume I, Court's General Rules and Circular Orders (Civil).]

#### Schedule.

##### FORM A.

I, A. B., Pleader, practising in.....  
certify that X. Y. has duly and faithfully served me as a probationer for the period required by the rules\* and, in my opinion, he is a fit and proper person to be admitted as a Pleader in the Courts subordinate to the High Court.

*Signature of the Pleader.*

*Date.....*

\*NOTE—In the case of a probationer who has served more than one Pleader, instead of the words "the period required by the rules", the actual period for which the probationer served each of them shall be stated, and a certificate shall be obtained from each of such Pleaders.

##### FORM B.

I, C. D. (District Judge or the Senior Munsif of \_\_\_\_\_),  
certify that X. Y. has served as a probationer in the Court of \_\_\_\_\_  
for the period required by the rules and his attendance in that Court has, on the whole, been regular.

*Signature of the District Judge*

*or the Senior Munsif.*

# The Calcutta Law Journal.

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VOL. L.

CALCUTTA, 1ST SEPTEMBER, 1929.

No. 5.

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## THE HON'BLE MR. JUSTICE B. B. GHOSE.

It is with sincere feelings of regret that we bid farewell to Mr. Justice B. B. Ghose. Although his name has not been one of national fame, it is a name which deserves to be very well known by his countrymen.

Like many a successful member of the legal profession, his career at the bar has been a chequered and eventful one. At the feet of his distinguished brother the late Sir Rashbehari Ghose, he had splendid opportunities of acquiring a thorough knowledge of the principles of law. But law and practice seldom go together and he was for sometime obliged to practice in the district of his origin, namely Burdwan.

After quite a long spell of years Mr. Ghosh came back to this Court and soon leapt into fame by his hard work, intelligence and conscientious discharge of his duties as a vakil of this Court. The elevation to the Bench of Mr. B. B. Ghose was commented upon by many a critic, but apart from his affiliation in blood and in law to the foremost jurist of the day, he had solid claims to such recognition.

On the Bench his work has been noted by his impartiality and indifference to the personality of the advocate appearing before him. He has been an exceptionally quick judge. His quickness made him abrupt. His intelligence made him impatient of elaborate legal disquisition. His verbal readiness was a menace to those proverbially deferential to the Bench. His mental readiness was a terror to the slow. On the whole his record was unique in disposing of First Appeals and he was always ready with his judgment which will bear testimony to the learned Judge's directness and lucidity and faculty for plain unadorned language.

In private life he is an extraordinary genial man. He likes company, he likes talk, he never minces matters and is refreshingly outspoken.

We wish the learned judge a happy and prosperous life in his retirement.

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## DISSOLUTION OF A HINDU MARRIAGE BY MAHOMEDAN LAW.

In a recent issue of the *Statesman* Mr. Justice Panckridge is reported to have given a judgment in the case of *Ayesha Bibi v. Bireswar*, *Statesman* August 31, 1929 on an application by a Hindu woman converted to Islam for a decree of nullity of marriage. The lady was married according to Hindu law. She was subsequently converted to Islam. She thereupon gave notice to her husband calling upon him to embrace Islam. On his refusal she applied to the High Court for annulling the marriage.

The matter was heard *ex parte* and Panckridge J, after satisfying himself that the conversion was bona fide granted a decree annulling the marriage under the authority, apparently of the Hedaya (Book II Ch. V) which lays down the procedure for a Muslim convert annulling a marriage with an unbeliever.

As the matter is of grave importance to the Hindu Community it is a pity that it was heard *ex parte* and the learned Judge did not get any assistance from the Bar with regard to what might be said on the other side. If the case had been argued on the other side it is hardly likely that his Lordship would have passed the order that he did pass.

There are several weighty grounds of law each of which was fatal to the application.

The application was made under the Mahomedan Law. It could not have been made under any other law, for the non-conversion of the spouse is not recognised as a ground for annulling the marriage in any other law in India.

Now, Mahomedan law is not binding law of its own force. Its authority and applicability are derived from statute. So far as Presidency towns are concerned the statutory provision which originated in the Regulating Act is now contained in section 112 of the Government of India Act. That section provides as follows :—

"The High Courts at Calcutta, Madras, Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras, or Bombay, as the case may be, shall in matters of.....deciding between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and, when the parties are subject to different personal laws or customs

having the force of law, decide according to the law or custom to which the defendant is subject."

It is clear from this that Mahomedan law would apply only if (1) both the plaintiff and the defendant were Mahomedans or (2) the defendant was a Mahomedan. In a case where the personal law of the plaintiff was Mahomedan law and the personal law of the defendant was Hindu law, the law which would determine their relations arising out of dealings between them, would be Hindu law and not Mahomedan law.

The applicant in this case being in the position of the plaintiff while the defendant was a Hindu, the Mahomedan law could have no application to the case and the application ought to fail on this ground alone.

*Secondly*, as Mr. Tyabjee points out in his Mahomedan Law, p. 249, the rule of law in the Hedaya under which this application was made is a part of Muslim Public Law and proceeds on the assumption that Islam was the State Religion. It was not a part of Mahomedan Law therefore which could possibly apply to India where Islam, or for that matter any other religion is not the State religion.

*Thirdly*, in a case of this character we have a conflict of personal laws. In cases of such conflict the law to be applicable has to be determined by the application of the rules of Private International Law. English Private International Law proceeds on the assumption that the personal law of a person is the law of his domicile and proceeds to lay down rules for deciding questions of conflict on that basis. But, as pointed out by Westlake in his Private International Law, (p. 1 foot note) "The existence within one territory of different juristic systems having different laws—e.g. the Hindu, the Moslem and the Anglo-Indian systems of personal law which are applied in British India—falls also within the scope of the subject."

Applying the principles of Private International Law to this question we are met at the threshold with the principle that the personal law of the wife during marriage follows that of the husband. Unless there has been a divorce or judicial separation, the wife cannot by her own act, e. g. by residing in a foreign country, acquire a separate personal law. (Westlake op. cit. p. 346, *Lord Advocate v. Jaffrey* [1921] A.C. 146). On that principle it can be said with some confidence that a Hindu wife by conversion to another religion during the continuance of her marriage, cannot acquire a separate personal law. Her personal

law is that of her husband, until he dies. In this case therefore the plaintiff could not clearly claim Mahomedan Law as her personal law.

Lastly, although the decisions of English Courts are not decisive on the question, it may be said that the logical deduction from the judgment of Kekewich J. in *De Nicols v. Curlier* [1900] 2 Ch. 410, is that where vested rights have been established upon marriage by the law of matrimonial domicile (here, the matrimonial personal law) they cannot be affected by subsequent change of personal law of the parties. Although this logical conclusion from *De Nicols'* case has not been drawn in some English cases, it is quite arguable that, since that case, an indissoluble marriage by the matrimonial personal law cannot be dissolved by a subsequent change of the law. The decision in *Mir Anwaruddin's case* [1917] 1 K. B. 634, lends support to this principle.

These are some of the very cogent reasons which could be urged in this case against the contention that the petitioner was entitled to make her application under Mahomedan Law. None of these reasons were placed before his Lordship and he had no opportunity of applying his mind to this aspect of the question.

Reliance was placed by Counsel for the petitioner on certain observations of Banerjee J. in *Ram Coomari's case* in 18 Cal. 264. Those observations have been a fruitful source of error. The observations were *obiter dicta* and in making them his Lordship did not consider whether, as suggested above, Mahomedan law was at all applicable to the case. Nor was a consideration of the question necessary in that case, which arose out of prosecution for bigamy, as their Lordships found against the accused's plea that by her conversion her marriage had been annulled, on the ground that even the conditions prescribed by the Hedaya for the annulment of such a marriage had not been fulfilled in that case. In saying what he did Banerjee J. assumed that the Mahomedan law applied and did not discuss whether it did, because he decided that even under the Mahomedan law the marriage had not actually been annulled. The other case referred to by Counsel for the petitioner was also an *ex parte* case and it does not appear that Buckland J. went into the question whether Mahomedan Law was at all applicable.

I have no doubt that if the arguments on both sides had been fairly placed before the learned Judge his decision would have

been entirely different. Unfortunately however there is no provision for a King's Proctor intervening in *ex parte* applications of this character. This case shows how very important it is that, in every case for dissolution or annulment of marriage, the public authorities should be represented by a King's Proctor. There is some provision for that in the Divorce Act, but none at all in cases under the Mahomedan law which seems just at the present time to be in great demand for dissolution of Hindu marriages. The result is that collusive applications may be made with assured success and every rule of public policy may be defeated by Counsel who feel themselves under no obligation to state the whole law in making *ex parte* applications.

As a matter of public policy, I should say that there should be a large scope for dissolution of unhappy marriages. But nevertheless it has always been a matter of public policy in English jurisprudence that the sanctity of the marriage tie should not be lightly violated at the caprice of a party. While, therefore, the indissoluble character of Hindu marriage is no doubt an anachronism, it cannot be either justice or public policy that either of the spouses should by mere change of religion or domicile be able to force a dissolution of marriage on an unwilling party. If an English woman voluntarily leaves her husband and goes to live in America, English law would not recognise any right in her to get a divorce by American law against her husband. Yet, if this decision is correct a Hindu woman could easily force a divorce on her husband by merely changing her religion, though, if she tried to change her personal law by change of domicile, she could not successfully do so. If an English husband runs away from his wife to Utah and becomes a Mormon, he could hardly expect to avoid an indictment for bigamy in an English Court if he chooses to exercise his right of polygamy under Mormon law. Even where the personal law of the husband permits polygamy, by contracting an English marriage, he is debarred from exercising his right of marriage. This was laid down in *Re Mir Asraruddin* [1917] 1 K. B. 634 and *R. v. Nagul*, 116 L. T. Rep. 640.

If the English rule is founded on public policy, it cannot be that it can be consistent with public policy that a Hindu wife can just at her sweet will break up the marriage by turning a Mussulman.

I need hardly notice another small point in this case, that, judging from the report in the *Statesman* it does not seem

that even the rule of procedure laid down in the Hedaya for dissolution of marriage has been followed in this case. There was no valid and formal tender of Islam by the Qazi in this case. It would create an intriguing situation if a Christian Judge were to make a tender of Islam as the true faith to a Hindu unbeliever, as a preliminary to passing a decree dissolving the marriage.

*High Court,*  
*Calcutta* }

N. C. SEN GUPTA.

### REVIEWS.

**The Law of Pleadings in British India with precedents:**  
By P. C. Mogha, B.A., LL.B. (3rd Edition, 1929).

The fact that in three years this book has run through three editions is the best possible tribute to its intrinsic merit. It has supplied a long-felt want and it has proved to be of immense assistance to all branches of the legal profession in the discharge of their duties in drafting pleadings and petitions. In our previous review we predicted that Mr. Mogha's venture would succeed in removing the handicap which legal practitioners felt without a proper guide on pleadings. That prediction has been amply fulfilled. This third edition has been enlarged by 108 new precedents of plaints, written statements and petitions. In certain circles, specially in the legal world of Bengal, complaint has been made that the precedents given in the book are too brief and require amplification. We strongly enter our caveat against this proposal. The very object of precision and brevity would be defeated by making these model pleadings more elaborate or prolix.

We congratulate the author on the well-deserved success of his work and the Eastern Law House on the excellent get-up of the book.

# The Calcutta Law Journal.

VOL. L.

CALCUTTA, 16TH SEPTEMBER, 1929.

No. 6.

## GOODS CONSIGNMENT NOTES AND RAILWAY RECEIPTS.

The somewhat misconceived idea of Railways in India being in all respects, bailees according to the Indian Contract Act, 1872, with responsibilities and liabilities of such, has given rise to the further confusion that the relations between Railways as carriers of goods and animals and the owners of such goods or animals, arise from contracts as found in the Forwarding Note and its counterpart the railway receipt. In some cases it has also been held that the contract under which the goods are carried is to be found in the railway receipt and the terms and conditions found therein are binding on the parties. It will be attempted in the following lines to disabuse the mind of this mistaken idea.

In connection with this matter one must remember that when the terms of a contract have been reduced into writing and in all cases in which the matter is required by law to be reduced to the form of a document, no evidence can be given in proof of such contract or of such matter except the document itself. The law about this was succinctly laid down by Sir Richard Couch Chief Justice of Bengal and Mr. Justice Pontifex in the case of *Kedar Nath Dutt v. Shamloil Khastiry* (1). Their Lordships' remarks as found on page 412 are "The rule with regard to writings is that oral proof cannot be substituted for written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository, and the appropriate evidence, of the agreement." The same view was taken by the Judicial Committee of the Privy Council in the case of *M. Subramanian v. Lutchman* (2) and this view of the law was also held to be correct by the Calcutta High Court in 1926 in the case of *Khetra Nath Siddar v. Hursuk Dass Balhissen Dass* (3). As found at page 706 of the last report,

(1) (1873) 11 B. L. R. 405.

(2) (1922) 38 C. L. J. 41.

(3) (1926) 31 C. W. N. 705.



their Lordships held that "It is undoubtedly a cardinal rule of evidence that where the terms of a contract had been reduced to writing, you cannot give any other evidence of the contract than the written document itself." "But" added the learned Judges "this rule applies only if the document was intended to be the embodiment in writing of the transaction ; and not if there was a complete oral contract before the writing was given and the document does not express and was never intended to express the whole agreement between the parties."

One must also bear in mind that "a person cannot hold to a part of a contract and reject the rest unless there is a statutory authority for doing so." Bearing in mind these cardinal rules, it will be attempted to show how impossible it is to hold that either the Goods Consignment Note or the Railway Receipt can ever be the contract between the Railway as carriers of goods or animals, and their constituents.

In the case of *Malkarjun v. The Southern Maratha Railway Co.* (1) it was said that "the Company's rule requires that the sender, when delivering the goods for despatch, must sign a consignment note in the prescribed form containing a declaration of the weight, description and place of destination of the goods consigned. On delivering the goods with the consignment note duly signed and filled in he receives a receipt, and then the contract to carry the goods to the place of destination mentioned is complete. If the consignee desires to have the goods carried further on to another station, there must be a fresh contract, a fresh consignment note given to the Company and a fresh receipt obtained from them and such a contract, under the Company's rules can only be effected by a consignment note signed by the original consignor or consignee." This case was decided in 1902. A similar view was entertained by the learned Judicial Commissioner of Nagpur in 1928 in the case of *The Secretary of State for India in Council (G. I. P. Ry.) v. Nand Lal* (2), in which case it was said that "the contract between the parties is embodied in two documents, one executed by each of them : the first is the consignment note signed by the sender and the other document, which is the counterpart of the consignment note is the Railway receipt, signed by the station master." Similar view was also held by Mr. Justice Chotmner of the Calcutta High Court in the case of *The East Indian Railway Co. v. Ram Chabilla Prasad* (3) in which his Lordship was of opinion that the plaintiff

(1) (1902) 1 L. R. 27 Bom. 126.

(2) (1928) 107 I. C. 206.

(3) (1924) 86 I. C. 552.

had based his claim on the *Railway Receipt*, which contained the contract between the parties. With all due respect to the learned Judges who decided the above cases it is said that neither the Goods Consignment Note (or the Forwarding Note) nor the Railway Receipt can be called the document containing the terms of the contract between the parties.

The Consignment or the Forwarding Note is a creature of section 58 sub-section (1) of the Indian Railways Act, 1890. Railways carry different kinds of goods at different rates of freight and these rates are prepared by the different Railway Administrations and are sanctioned by the Governor General in Council. Section 58(1) lays down that "The owner or person having charge of any goods (i) brought upon a Railway for the purpose of being carried thereon, and (ii) the consignee of any goods which have been carried on a Railway, shall on the request of any railway servant appointed in this behalf by the railway administration, deliver to such servant *an account in writing signed* by such owner or person or by such consignee, as the case may be, and containing such a description of the goods as may be sufficient to determine the rate which the railway administration is entitled to charge in respect thereof." So the sole purpose for which this declaration under the statute, is necessary is determination of the rate of freight chargeable for the particular kind of goods consigned. If the goods are sent unpacked no declaration would be necessary. In most cases however goods have to be sent packed to save them from getting damaged *en route* and "if goods which require to be packed are offered for carriage, the carrier may lawfully refuse to accept them unless they are properly packed" (Halsbury's Laws of England Vol. IV p. 7). So goods are in most cases sent packed, sometimes for the convenience of the owner but generally for the benefit of both the owner and the carrier. In such cases the consignor or the person giving delivery of the goods has, at the request of the Railway official, to give a declaration in writing signed by the consignor or the deliverer. Such a declaration, if not given by the sender or the deliverer at the forwarding station, can be called for from the consignee at the destination station. This fact of the right of the Railways to get a declaration from the consignee after the carriage of the goods when no declaration has been made at the forwarding station is, by itself, an indication showing that such a declaration can hardly be called a contract of carriage between the owner and the carrier. Then again what is the consequence if no such declaration is made? If no such declaration is made at

the forwarding station the Railway official under section 58(a) may first ask the sender, deliverer or the consignee to open the parcel or package containing the goods in order that their description may be ascertained; and if the declaration is not made and there is refusal to open the parcel or package the Railway can refuse to carry the goods unless in respect thereof a rate is paid not exceeding the highest rate which may be in force at the time on the Railway for any class of goods; in respect of goods which have been carried on the Railway under similar circumstances, the Railway may charge a rate not exceeding such highest rate. So it boils down to this that the sender, or deliverer of goods to be carried and the consignee of goods already carried should *if requested* make a declaration; the purpose of the declaration being merely to afford facility to determine the exact rate of freight chargeable for the particular kind of goods. The imposition of duty to do a certain act is of little value unless there is a driving force at its back to penalise non-performance of such duty. The only penalty prescribed by the statute as found in section 58(a) of the Railways Act, 1890 for not making a declaration is payment of a higher rate of freight than would be chargeable if proper declaration was made; if the bailor is willing and ready to pay such higher rate of freight there is nothing which can force him to make a declaration. A document of such a nature can hardly be called a basis of contract of carriage.

The popular idea is that whenever goods have to be delivered to a Railway administration for carriage a Forwarding Note or a Goods Consignment Note in a printed form must invariably be given along with the goods at the time of offering them for being carried. That it is not so is patent from section 58 subsection (1) of the Railways Act, 1890 itself which lays down that such a declaration has to be made only "on the request of any railway servant appointed in this behalf by the railway administration." If such a railway servant does not consider it necessary to take such a declaration no declaration need be made. It is clear therefore that the said declaration is made simply to facilitate work in case of goods sent packed. The giving of such a declaration is not a condition precedent to acceptance of the goods by the Railway, for a declaration can, under the same section 58 be made after the goods arrive destination. *Pari passu* it may be noted that it was held by the Bombay High Court in the case of *Iskwardas Gulab Chand v. G. I. P. Railway Co.* (1)

(1) (1878) I. L. R. 3 Bom. 120.

that the Goods Consignment Note is not the basis of the contract between the parties as the description of the goods given by the consignor in the Goods Consignment Note was not a part of the contract. In that case the agent of the owner who delivered the goods to the railway, erroneously, but without a fraudulent intent, stated the contents to be alum while in reality it was sugar candy. In the course of the journey a fire broke out in the train, and a large portion of the sugar candy was destroyed. It was held that the misdescription of the goods did not exonerate the Railway from liability but it was held that the plaintiff was entitled to the value of alum and not of sugar candy while the Railway Co. could not in respect of the bags destroyed charge freight as for sugar candy but were entitled to freights for alum. Perusal of the columns of Goods Consignment Notes as sanctioned by the Governor General in Council will also show that the entries that have to be made in the columns of the Note are all variable and subject to correction and change. The owner consignor by endorsing over the railway receipt may cease to be the owner; the consignee similarly ceases to be such by assigning his rights to others. The sender's weight is not the *Sine qua non* for charging freight and finally the description of goods as stated by the consignor need not be relied on by the carrier. No formality is necessary about execution of a Goods Consignment Note. It is the delivery of the goods by the consignor and its acceptance by the Railway which completes the contract. As a matter of fact it was held by the Allahabad High Court in the case of *Munsal v. The East Indian Railway Co.* (1) that a letter containing a clear request to book goods has the effect of a Forwarding Note. In that case what happened was that two consignments of Strawboard of 53 and 48 bales respectively were booked from Howrah for delivery to the consignee at Agra. The consignment of 48 bales arrived Agra and were taken delivery of by the consignee. The other consignment of 53 bales also reached Agra but as the consignee had sold the said 53 bales to a firm at Delhi he wrote the Station master Agra requesting him to book the said 53 bales to the address of of the said firm at Delhi. On account of the exigencies of war and non-availability of wagons the goods could not be sent to Delhi for some time. Thereafter wagons were available only 48 bales were sent to Delhi—the remaining 11 bales having been lost while lying at the Railway Station at Agra. It was held

(1) (1922) 82 I. C. 771.

that although there was no Goods Consignment Note still the Station Master not having directed the consignee to remove the goods or telling him in unmistakeable terms that the goods were lying at Agra at his own risk he, by his conduct in keeping the goods in the Railway premises, was held to have accepted bailment of the goods on behalf of the Railways and the Railway Company was held responsible for the loss to the consignee under section 72 of the Indian Railways Act, 1890. A document, (to wit, a Goods Consignment Note) the terms of which are variable can not be a basis of contract. The entries made by the consignor at the top portion of a Goods Consignment Note and those made by the Railway officials at the bottom portions thereof are some of the incidents of the contract between the parties and are variable.

The real purpose served by a Goods Consignment Note seems to be two fold—one is facility of booking and the other is fixing the consignor with notice of the terms and condition printed on the back of the Consignment Note.

The Railway Receipt is nothing but a token given by the Railway Company showing that they hold the goods covered by the document for the purpose of carrying them and delivering them to the consignee at the destination. It is an acknowledgment "by Railway" of a prior delivery (31 Cal 952). In the case of *Jahin Singh Kotary v. Secretary of State for India* (1) the Goods Consignment Note with regard to four bales of piece goods delivered by the plaintiff to the defendant was not found with the Railway (E. B. Railway) and no Railway Receipt was given. The goods being lost the plaintiff filed a suit for recovery of the price of the four bales and it was held that although no receipt was given about those four bales, the plaintiffs having proved delivery of the goods to the carriers, they were liable as bailees. Section 74 of the Indian Railways Act ordains that "a Railway Administration shall not be responsible for the loss, destruction or deterioration of any luggage belonging to or in charge of a passenger unless a railway servant has booked and given a receipt therefor."

Section 72 of the Indian Railways Act "puts in a legislative form the ordinary law upon the subject which is that, when goods are delivered to the Railway to be carried, they become liable like any other bailees" (31 Cal 915 at 958).

The contractual relation of bailor and bailee emanate

(1) (1904) I. L. R. 31 Calc. 952.

neither from the consignment or Forwarding Note nor from the Railway Receipt but from delivery of goods by the consignee and acceptance of the same by the carrier. "Delivery in section 72 refers to a physical event, an important element of which is that whatever is delivered passes from the physical custody of one man to the physical custody of another. It is a purely lay word, devoid of any legal significance at all; it alludes to a physical event." Such delivery cannot be in any way affected by any legal event such as the execution of Forwarding Notes or getting of Railway Receipts.

There is no duty incumbent on a Railway Company to get back the Railway Receipt before delivery is given, "it only reserves the liberty to refuse, in its description, to deliver the goods unless the railway receipt is produced" (41 Mad 871). In case of loss of Railway Receipts the Railway Company, if they are satisfied that the person applying for delivery is entitled to receive the goods, are entitled to and do give delivery of the goods. In such cases they may at their *ipsi dixit* take an indemnity from the person claiming delivery. In some such case they give delivery only by taking his signature in their delivery book. A document (a Railway Receipt) which is treated with such scant courtesy can hardly be called the basis of contract between the parties.

The Forwarding Note and the Railway Receipt (which is posted from the entries made in the Forwarding Note) are documents containing the incidents of the contract between the parties. These incidents are variable and are in many cases varied. Neither of these is a basis of the contract between the parties.

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Alipore.

Sailendra Kumar Palit

## REVIEWS.

**The Code of Criminal Procedure** by Dinesh Chandra Roy, M. A., B. L., published by Butterworth & Co. (India) Ltd., September 1929.

Although there is quite a number of books already published on the subject of Criminal Procedure, there was still room for another. The radical changes introduced into the old Code called for a new commentary. Without any disrespect to the learned authors of the books already published, most of them are mere digests of cases without any discriminate use of the numberless authorised and unauthorised law reports.

Mr. Dinesh Chandra Roy has given us a work which will stand the most careful scrutiny and compare favourably with any other rival in the market. The author seems to have thoroughly appreciated the scope and purpose of the work. He has not made it a mere meaningless, purposeless catalogue of cases, nor a scrappy annotation on the more popular sections of the Code.

In this book one will find an orderly, comprehensive and compendious arrangement of the law on the subject and in the case of conflicting decisions an expression of opinion on the points in dispute verified by carefully selected precedents accompanying it. We should not commit the folly of excessive praise. But in justice to the author we should add that he has made the case-law up-to-date and brought it down to the end of June 1929, and to avoid the difficulties of legal practitioners in different parts of India he has given cross-references, as well as citations from the non-official law journals.

It is a great relief both for legal practitioners as well as students of law to find that unlike his avowed intention in the commentary on the Penal Code, the author has not launched on this work with any avowed purpose of making it useful for the defence. A commentator must be free from all such bias. His main purpose is the pursuit of truth and his highest ambition is to assist those engaged in the administration of justice.

The arrangement of the work under review leaves nothing to be desired. The important sections have been printed in parallel columns. The amended sections have been shown in the right-hand column and the amendments printed in italics. One other noticeable feature is that the amendments introduced in the old Code of 1898 have also been printed in the left-hand column in italics. The corresponding sections in the former Codes

have been given in each section. In good many places under the heading "Earlier Law" the case law under the previous Code has been critically examined. Then the "Legislative Changes" have been introduced and the report of the Select Committee and the statement of objects and reasons have been given. Earlier decisions have been collated and considered under the heading "Effect of Amendment." The object and scope of the sections have then been as far as possible in the language of judicial decisions. All relevant cases have been cited under appropriate headings. Rules and circulars have also been given in extenso and the author has not hesitated to express his views and to offer practical suggestions in many places.

We have no doubt that the book will be of great service to legal practitioners who will find it a most useful and practical work. A carefully drawn up table of cases, and an index increase the usefulness of this work.

*International Law as applied to Foreign States*, by Julius I. Puente, LL. M., of the Chicago Bar, published by Burdette J. Smith & Company, Chicago, 1928.

Professor Puente, the author of the valuable treatise on "The Foreign Consul" has made a welcome contribution on the juridical status of foreign states in American jurisprudence. As the author himself concedes, the book has avoided an historical analysis, but it has given a very satisfactory exposition of the legal principles, as understood by the Courts and the Political Departments of the United States. Instead of rough generalizations, the author has relied mostly on reported cases and the official opinions of the executive departments of the American Government. Any book which follows the wording of judgments suffers from various obvious disadvantages. It becomes a bead-roll of cases or a collection of obiter dicta. But in the sphere of International Law it is far better to be accurate rather than picturesque, and the safest course is to present the law not from the pages of publicists but from the decisions of learned Judges.

His Excellency Mirza Davoud Khan Meftah, Envoy Extraordinary and Minister Plenipotentiary of Persia to the United States, has written a Foreward to this treatise. Any one who takes the trouble of going through the pages of this treatise, full of accurate and precise information, cannot but endorse the opinion of the Persian Minister:—"Here is a text which is clearly and analytically written, and well documented; a text which should be of



great practical value to those interested in International law and relations."

The United States have figured in many controversies in the sphere of International Law which have developed certain aspects of the law of nations. Take the question of partial recognition of Belligerency. In 1893 when a Belgian squadron revolted, the United States Government while recognizing the existence of war between Brazil and the insurgents, refused to allow latter the belligerent right of seizing contraband. The Venezuela Hinterland dispute and the Panama Canal question have also materially developed the law relating to the territorial property of a state in International Law. The controversy between Great Britain and the United States with regard to the interpretation of the celebrated Clayton-Bulwer treaty has clarified the law as regards the construction of international treaties. But the most remarkable contribution of the United States has been the extension of Lord Stowells doctrine of Continuous Voyage, which was applied by the American Courts to cases of contraband and blockade. For a good long period the American doctrine was condemned by practically all the nations of the world, although later events have to a large extent justified the acceptance of the American view-point.

The peculiar contribution of the United States towards the development of the law of nations has been to some extent rendered obscure in the mass of documented materials compressed within a short compass in this treatise.

The most important and valuable contributions of the author will be found in the Chapter on Treaties and in particular under the heading "The Constitutional Limitations of the Treaty-making Power."

The accepted canons of construction have been carefully analysed, scrutinized and discussed in a manner which will do credit to any writer on this difficult branch of law.

We wish the index had been fuller and a table of cases added. These would have materially added to the value of this useful work.

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{ NOS. 7-10

## DISSOLUTION OF A HINDU MARRIAGE BY MAHOMEDAN LAW.

(a) *Letter from Mr. I. B. Sen.*

To

The Editor,

Calcutta Law Journal.

Sir,

Dr. N. C. Sen Gupta's article on "DISSOLUTION OF A HINDU MARRIAGE BY MAHOMEDAN LAW," was published in 50 C.L.J. 40 on a day or two after my article on "A Much Debated Ex Parte Decision" (33 C. W. N. cxxxvii) was already in print. I had not the advantage therefore of perusing Dr. Sen Gupta's article when I wrote out mine. Dr. Sen Gupta's article deserves notice as the first serious attempt by a lawyer of repute to challenge the soundness of the decision of Panckridge J. in *Aysha Bibi v. Bireshwar Ghosh Mazumdar* (33 C. W. N. cxxxix).

Dr. Sen Gupta's article is based in part upon erroneous statement of facts. (I) The proceedings before Panckridge J. were not an application in a matrimonial matter but a regular suit under Ordinary Original Civil Jurisdiction of the Calcutta High Court. The suit was for a declaration that the Hindu marriage of Padmasana Ghosh Mazumder (now Ayesha Bibi) stood dissolved. (II) More important than the first error upon which Dr. Sen Gupta bases his criticism of the judgment of Panckridge J. is the mistaken assumption that the defendant Bireshwar Ghosh Mazumdar is an "inhabitant of Calcutta." He is a resident of Naihati, E. B. Ry. and for that reason leave under clause 12 of the Letters Patent to institute the suit in the Calcutta High Court was necessary and such leave had been obtained. Section 112 of the Government of India Act could not therefore apply to the case upon that ground alone. And Dr. Sen Gupta's conclusion, based upon section 112, to

the effect that "the application ought to fail on this ground alone" was without any basis in facts.

Dr. Sen Gupta's faulty quotation of section 112 at once betrays his nervousness as to the applicability of that section to a case concerning a Hindu marriage. That section applies only to "suits against inhabitants of Calcutta" which relate to "matters of inheritance and succession to lands, rents and goods" or "matters of *contract and dealing* between party and party". Dr. Sen Gupta finds it necessary to omit the words "Contract and" from his quotation and place before the readers only "dealing between party and party". I have already pointed out elsewhere that a marriage solemnised under Hindu law cannot be classed as a matter of contract. I shall leave it to the reader to discuss how far a Hindu marriage like the one before us where the gift of the bride (*sampradanam*) by her guardian to the bridegroom was an essential ritual, can be classed as a "dealing between party and party". Surely, the Regulating Act or the Government of India Act was not intended to alter the character of the Hindu marriage, in anticipation of a case like the present, seeing that in a Hindu marriage even of a graduate girl of the University of Calcutta the consent or the want of consent of the bride is a matter of indifference on the question of the validity of the marriage.

In his eagerness to find fault with the decision of Panckridge J. Dr. Sen Gupta points out that in the present case there was no valid and formal tender of Islam to the husband by the Judge. The invitation to the husband to accept Islam was from the wife. Dr. Sen Gupta overlooks the important facts (III) that the husband though served personally with the writ of summons declined to come forward to deny the allegation that he was an unbeliever and persisted in continuing to be an unbeliever and (IV) that since the institution of the suit the husband seriously and indignantly refused to accept Islam. Where then was the significance of a formal tender of Islam to the husband by the Judge?

Dr. Sen Gupta very pertinently refers to one or two anomalies and exposes the one that would arise if a Christian Judge were called upon to tender Islam as the true faith to a Hindu unbeliever. Another anomaly Dr. Sen Gupta himself suggests when he wants a King's Proctor i. e., a Proctor, possibly neither Hindu nor Moslem, who will represent a Christian King-Emperor and protect Hindu marriages from encroachments of Moslem law in cases where the Hindu husband does not care for the protection. None of us relish the humour and few of us are conscious of it though

every day we are applying the Austinian conception of positive law and right to the so-called Hindu Law or the so-called Mahomedan Law, each with a capital L, when in fact, as Dr. Sen Gupta points out very appropriately, neither Hindu Law nor Mahomedan Law is law in British India as the term "law" would be understood in modern Europe or the United States of America.

But as a forensic fun it is hard to beat Dr. Sen Gupta's serious contention on the slender authority perhaps of an editorial footnote written possibly in modern Jerusalem, that the relation between a Hindu wife in Calcutta who has turned a Moslem and her Hindu husband who refuses to be a Moslem, should be governed by a House of Lords decision [*Lord Advocate v. Jeffrey* (1)] on the question whether a Scottish Christian wife who had settled with her Scottish Christian husband in Scotland until the husband removed for ever to Australia and who continued to live in Scotland until her death, with no intention to go to her husband in Australia, the husband having been guilty of desertion and adultery in Australia—whether such a wife acquired a juridical status independent of her husband, a status based not upon change of religion nor upon any possible consequent change of personal law, such as Hindu law is, but upon the question of a domicile of her own different from and independent of the domicile of her husband. What bearing that decision of the House of Lords can have upon the question which was before Panckridge J. has been a puzzle. The House of Lords decision was based upon the principle that the wife's domicile was that of the husband, even though the husband changed his domicile and acquired a new one where the wife never contemplated to follow the husband. From the fact that the wife did not in the eye of law still retain her domicile of origin, certain legal consequences followed as to succession and inheritance. But whether the law which should govern a person as to certain specified matters was the territorial law of the country in which that person or his property happened to be or was the law of his domicile where also the spirit of the law was territorial and not personal, it is difficult to understand why a Hindu or a Moslem should be governed by rules based upon the territorial notion of law. The whole of the spirit of Hindu Law and of Mahomedan Law was against the territorial notion of law. I have elsewhere discussed this aspect of the problem and do not propose to discuss two other decisions of English Courts discussed by Dr. Sen Gupta. The decision in *Mir Anwaruddin's*

(1) [1921] 1 A. C. 146.

case (1) was quite in keeping with the territorial conception of law which dominates England and which should govern a marriage solemnised in England according to English law. Lord Reading refused to uphold Mir-Anwaruddin's contention based upon the law that the wife's domicile was no other than the husband's and upon the fact that the husband's domicile in that case was India and upon the further proposition of law that in India Mir-Anwaruddin could have pronounced talak under Mahomedan law, if the marriage were under Mahomedan law. The Court of Appeal held that in England a marriage with a Christian woman celebrated under English law could not be dissolved by pronouncement of talak. I do not see how this decision applies to the problem which Panckridge J. had before him.

There is only one other point which I should discuss. Is it so very certain that the spirit of the Hindu law is opposed to the dissolution of the marriage of a Hindu wife who becomes a Moslem and thereby ceases to serve the religious purpose of a Hindu marriage? It is not merely that she becomes an outcaste. She ceases even to be an outcaste Hindu. The very object of a Hindu marriage is the performance of religious duties by the husband in the company of the wife. That becomes impossible and she ceases to be wife by change of religion and consequent *varjan* by the husband. But a modern court of equity is not bound by the strict letter of Hindu law.

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High Court, Calcutta. }

Yours truly,

I. B. Sen.

(1) [1917] 1 K. B. 634.

(b) *Dr. Narash Chandra Sen Gupta's reply.*

Mr. I. B. Sen's answer to my note as well as the article contributed by him to the Calcutta Weekly Notes invites an extensive rejoinder. For, the greater part of his comments raises large issues of public policy and theory of law, a discussion of which must needs be voluminous. But I shall confine myself in my answer mainly to the question how far the decision in Ayesha Bibi's case is consonant with the law of the land and only permit myself a few brief observations on the wider question raised by him.

I am grateful to Mr. Sen for correcting my misapprehensions. I am surprised to find that he does not notice that, with the corrections, the facts of the case rather strengthen my case.

In the first place if it had been an application under the Mahomedan law to the Judge as Kazi to tender Islam to the husband and on his refusal, to declare the marriage dissolved, subject only to the objection that Mahomedan law did not apply to the case, the decision would have been unexceptionable. Assuming that the Mahomedan law applied to the case, that would be the procedure laid down in the Hedaya, by compliance with which alone the marriage could be annulled.

A suit for a declaration that the marriage stood dissolved on the other hand stands on a different footing. It assumes that *at the date of the suit* that the marriage has already been dissolved. Unless that was the fact the suit for declaration must be dismissed. The operative element in a dissolution of marriage being the pronouncement of a kazi, in the absence of such a pronouncement a declaratory suit obviously did not lie.

So that whatever room for dispute there might be as to whether a British Court would or could perform the function assigned to the Kazi in the Hedaya in a case of this character, there cannot be the slightest room for doubt that, unless and until it has done so, a suit for declaration of dissolution as an accomplished fact does not lie.

The second correction by Mr. Sen also does not improve his case. If the parties were not inhabitants of Calcutta the law to be applied to them would be that laid down in the Civil Courts Act, which, as Mr. Sen candidly admits in his article in the Calcutta Weekly Notes, makes Hindu law or Mahomedan law inapplicable unless both the parties professed the same faith. Mr. Sen surely knows that Hindu law or Mahomedan law is not the law of the land by its own force, but by reason of its statutory recognition. Its scope and applicability is limited by the statute which makes it applicable. That statute is either the Government of India Act or the Civil Courts Act. Under both these statutes, Hindu law or Mahomedan law would be inapplicable unless both the parties profess the same faith, except in Calcutta where it would apply if it is the defendant's law.

The position then is that whether the defendant was a resident of Calcutta or of the Mofussil, Mahomedan law would not apply to this case for determining the rights of the parties. This much is in fact admitted by Mr. Sen in his article in the Calcutta Weekly Notes, where he labours to establish that neither section 37 (1) of the Civil Courts Act nor section 112 of the Government of India Act would apply to this case.

What then is the position? Mr. Sen's contention in his article is that the decision should be given according to justice, equity and good conscience, as provided in section 37 (2) of the Civil Courts Act, and that as a matter of fact the decision was based on that.

To the first part of this proposition I have not the slightest objection. With regard to the second part the simple answer is that the suit was, as appears from the note in 33 C. W. N. clxxix "for a declaration that *under Mahomedan law* the plaintiff's marriage . . . stood dissolved", and, according to the same note "his Lordship, *acting as a Kazi*, made the declaration that the marriage stood dissolved". So that the Court was asked to declare the rights of parties as under Mahomedan law and in fact purported to act under the Hedaya, *not* to declare that the marriage had already been dissolved by the act of the parties, but that it stood dissolved *under this order*.

Accepting Mr. Sen's opinion that Mahomedan Law did not apply both the suit and the decree were therefore misconceived.

Mr. Sen tries to be funny over my omitting the word 'contract' from my quotation of section 112 of the Government of India Act. But he himself admits that the question at issue in this case was not a question of contract, and that the only question was whether it could come under the words "dealing between party and party". I suppose there was nothing wrong therefore in my omitting the irrelevant word. Mr. Sen thinks that a Hindu marriage is not a question of dealing between party and party. He is welcome to his illusion on this score. But the question at issue in this case was not a question of the marriage, but whether by the acts done by the wife in giving her husband notice to embrace Islam and by his refusal the marriage was dissolved. This would assuredly be a "dealing between party and party," and therefore, if section 112 applied, to be decided by Hindu and not Mahomedan law.

Mr. Sen is indignant that I have noted the fact that there was no tender of Islam by the Judge. "The tender," he says "was by the wife." But if Mr. Sen had only cared to look up the Hedaya, instead of groping about the misleading judgments of the Courts he would have found that under the Mahomedan law tender by the Kazi was essential. The Hedaya does not recognise the possibility of a dissolution in any other way. Incidentally, Mr. Sen does not seem to notice the pertinent observation of Mr. Tyabji quoted by me which shows the hopelessness of seeking to apply this part of the Mahomedan law in India.

Though not an admirer of the Austinian theory in the abstract

I frankly confess I have failed to see the bearing in this connection of Mr. Sen's sneers at the Austinian concept of law which he somehow brings into this discussion along with ill-digested scraps of mediaeval jurisprudence. If it is his idea, as seems probable, though not quite clear, that Hindu or Mahomedan law should not be applied in the same way as legislative enactments, he has my sympathy. But, so far as British Indian Courts go, a long course of judicial usage has sanctioned such use and it would be disastrous if the Courts were now free to take liberties with that law as so administered, in a manner so as to upset all formed expectations.

But if Mr. Sen's proposition were accepted, would it not be pertinent to observe that the portions of Mahomedan law upon which he relies should not be applied for several sound reasons. In the first place that law proceeds upon the fundamental assumption that Islam is the true faith which it would be perverse in a man not to adopt—a proposition which the State in India cannot subscribe to. Besides no surer way to set the two communities by their ears could be conceived.

Mr. Sen fails to see the relevancy of the decisions in *Lord Advocate v. Jeffrey* (1) or in *Mir Anwaruddin's case* (2). He sees in these decisions the stamp of the notion of territorial law which, he thinks, we must eschew. Mr. Sen is apparently deceived by the references to the law of domicile in these cases. If he will study Private International law with a little more attention he will be able to see in these cases questions of the application of the *personal* laws of the parties as distinguished from territorial law. In England the personal law happens to be the law of the domicile. But the decision would be the same if the personal law were founded on anything else e. g. nationality, religion, race &c. In some countries the personal law is the law of nationality and not domicile. Even there the personal law of the wife follows that of the husband. Supposing that in *Lord Advocate v. Jeffrey* (1) the husband had gone abroad and acquired a domicile in Germany. The result of that would be that the personal law of the wife would still be determined by the personal law of the husband, and for the husband's personal law a reference would be made to the law of Germany. But as in Germany the personal law of the husband would be deemed to be that of his nationality irrespective of domicile, there would be a reference back to the Scottish law by *renvoi* and thus by deduction the personal law of the wife would be the law of Scotland. This would show that the rules of Private International law far from being dominated by the territorial notion of the law are really

(1) [1921] 1 A. C. 146.

(2) [1917] 1 K. B. 634.



founded on a limitation of the territorial law by reference to personal laws.

In *Mir Anwaruddin's* case (1) the facts were no doubt different. I never said that they were otherwise. But that case is an authority for the proposition that the matrimonial personal law stamps upon the marriage some rights and obligations which cannot be removed by mere change of personal law. Where a marriage is celebrated under English law, it cannot therefore be dissolved in a mode not recognised in English law as a valid dissolution of marriage. Similarly where a marriage is consecrated by Hindu law, it stands to reason to say that it cannot be annulled in a manner not recognised by Hindu law.

No doubt it can be, if a party becomes a Christian and the other spouse refuses cohabitation. But that is because it is so laid down by the legislature. It does not follow from principle.

Mr. Sen, particularly in his article in the Calcutta Weekly Notes brings in a number of questions as to whether in such case marriages *ought* not to be dissolved. I have not attempted to go into that question, which is a matter for the legislature rather than for Courts.

I frankly concede that there should be a large scope for dissolution of unhappy marriages even by Hindus and I would wholeheartedly support Mr. Sen in any endeavour to get a sound and sensible Divorce Act passed by the legislature for the purpose. But at the same time, constituted as society now is, I cannot subscribe to any law by which marriage relation could be broken at the caprice of either spouse, by the transparent device of changing the personal law or otherwise. There is a good deal of sound sense in the view of English law that marriage is a matter of public policy and while its constitution should depend on the will of the parties, its dissolution should not be allowed except for sound reasons, which the public authorities must scrutinise. Even in America where a large measure of freedom of divorce is recognised in many States, the law does not go the length of giving freedom to either spouse, thus reducing the institution to the level of companionate marriages.

To give effect to Mr. Sen's contention would lead to exactly this consequence. The wife can, by becoming Mahomedan force a dissolution by judicial decree for no other reason than that the husband does not become a Mahomedan, though the husband may be perfectly willing to cohabit with her in spite of her change of religion. Not only so, but, if Mr. Sen's logic is right, that when

(1) [1917] 1 K. B. 634.

a spouse becomes a Mahomedan, by justice equity and good conscience he ought to have marital rights according to Mahomedan law, a Hindu husband can, by becoming a Mahomedan, forthwith pronounce talak on a faultless wife, without even going through the formality of applying to the Kazi. Among Moslems this rule of law is sufferable because a certain measure of security is provided to the wife by her *kabin*. But the Hindu wife would not even have her dower. One shudders to think of the consequences which might follow if this were the law.

In conclusion Mr. Sen asks whether the spirit of Hindu law is against the dissolution of such marriages? The answer which he gives will provoke a smile in those who know Hindu law. According to Hindu law a wife does not lose her status as wife even by becoming *patita*, though the husband may renounce her. But the husband cannot renounce her, in the sense of turning her out and refusing her even starving maintenance (*pindamstrim*) for any cause, at any rate short of *patitya*. So there is no question of marriage being dissolved for the wife changing her religion. According to Hindu law a person would not become *patita* by mere conversion to Islam. Dissolution of marriage is possible only for the reasons stated in the well-known text of Parasara. If Mr. Sen doubts any of these propositions, I should be able to satisfy him from authorities.

The last sentence of Mr. Sen's letter is amusing in its *naïveté*. "A modern court of equity," he says "is not bound by the strict letter of Hindu law." Mr. Sen's idea of a Court of equity is not unfamiliar in the man in the street, but it is surprising in a lawyer. The equity of the Courts is not measured by the Judges' conscience but administered according to well-recognised principles and precedents. And unfortunately, precedents are all against the view of Mr. Sen.

I refrain from discussing the question whether apart from Hindu law, as a matter of justice equity and good conscience the Court ought to declare a marriage dissolved in such cases. The question of marital relations and rights are not matters of equity but of positive law, and where the positive law does not provide for a dissolution, that remedy cannot be given by Courts. There is no principle of equity which would apply in such a case.

Bar Association,  
High Court, Calcutta. }

N. C. Sen. Gupta.

### POWER OF THE COURTS TO STAY PENDING PROCEEDINGS.

The power of the Courts to stay proceedings belongs to the domain of adjective law which regulates the procedure whereby a legal right can be enforced as distinguished from substantive law which lays down and defines such right : *Poyser v. Minors* (1). This power is founded on the inherent jurisdiction of the Courts to do all such acts as may be necessary to dispense substantial justice for the administration of which alone they exist : *Hukum Chand v. Kamalanand* (2).

There is a marked difference between this power and the power to stay suits under section 10 of the Civil Procedure Code. Whereas the exercise of the statutory power is obligatory on the Courts if the conditions laid down in the section are satisfied, the exercise of the inherent power is purely discretionary. The latter is moreover wider in its application than the former. Thus whereas under section 10 it is only the subsequent suit that can be stayed, under the inherent power, the Court may for good reason stay the previously instituted suit *Mungle Chand v. Gopal Ram* (3).

As regards the Chartered High Courts, it has been held that their powers to grant an injunction are not confined within the four corners of the provisions of the Code, but as Courts of equity they have inherent power to order stay of suits. In this view all the Courts are unanimous. But there is a diversity of opinion as to within what limits this power is exerciseable. In *Mungle Chand v. Gopal Ram* (3), Sale J., ordered the stay of a previously instituted suit pending in the Bareilly Court notwithstanding the fact that the Bareilly Court was not subordinate to the High Court and that the defendant whom it was sought to restrain did not reside within the High Court's jurisdiction. This view was not accepted by Fletcher J., in *Vulcan Iron Works v. Bishumbehur Prosad* (4) who held that the High Court could only restrain proceedings outside its jurisdiction when a party to the suit before it, whom it was sought to restrain was personally within its jurisdiction so that in the event of disobedience he would be subject to process of contempt. This decision was followed by Stephen J., in *Jumna Dass v. Harcharan Dass* (5). In this suit Stephen J., left open the question whether the Court would have had jurisdiction to make the order if the party to be enjoined had property within its jurisdiction and not that that was not sufficient as the head note misleadingly suggests.

(1) (1881) L. R. 7 Q. B. D. 329, (333).

(2) (1906) I. L. R. 33 Calc. 927, 931-32; 3 C. L. J. 67.

(3) (1906) I. L. R. 34 Calc. 101, 103.

(4) (1908) I. L. R. 36 Calc. 233, 237.

(5) (1911) I. L. R. 38 Calc. 405

It would tend to a clearer appreciation of the decisions, if before discussing them, we enunciated the principles which govern the Courts of Equity in ordering stay of proceedings.

1. No Court will make an order for stay, or for the matter of that any other order, which it is powerless to make effectual.

2. With regard to foreign proceedings, the Court will restrain a person within its jurisdiction from instituting or prosecuting suits in a foreign Court whenever the circumstances of the case make such an interposition necessary or expedient. *Carron Iron Co. v. MacLaren* (1).

3. The Court has complete jurisdiction over parties who voluntarily submit thereto. (Dicey's Conflict of Laws 3rd Edn. p. 44).

4. When a plaintiff is in contempt the action will be stayed on the application of the defendant, until the contempt is purged (Gawald on Contempt, 3rd Edn. p. 248).

5. A defendant though in contempt will be at liberty, without purging his contempt, to take every step necessary for his defence. *Fry v. Ernest* (2); *Gordon v. Gordon* (3).

6. Contempt is punishable by arrest and committal or "whip" the disobedient person cannot be found or remains in Jail without paying obedience to Court", by sequestration of his property. (Daniels Chancery Practice 8th (1914) Edn. p. 789).

It would appear to follow from these principles that when the person to be enjoined is the defendant, he must either be or have property within jurisdiction which the Court can lay hands on in case of disobedience otherwise the Court would be powerless to make the order effectual. If however the party to be enjoined is the plaintiff, it does not matter whether he resides or has property within jurisdiction. His suit can always be stayed on the defendant's application until the contempt is purged. Thus in *Dumkins v. Simonetti* (4) there were certain assets of a deceased lady in England which the plaintiff and the defendant were adversely claiming. The plaintiff applied in the English Courts to restrain the defendant who was residing at Naples (see judgment p. 229) from proceeding with his action, in the Naples Court. Sir George Jessel dismissed the application because no case of double vexation had been made out and the balance of convenience was in favour of continuing the proceedings in the Italian Court. But the Court's power to order stay of foreign proceedings in a proper case, even where the defendant was personally out of the Court's jurisdiction, was never doubted (see judgment).

(1) (1855) 3 H. L. Cas. 416, 436.

(2) (1863) 12 W. R. 97.

(3) [1904] P. 163, 167.

(4) 29 W. R. (Eng.) 222.

• Similarly in *Maclaren v. Stainton* (1) the Lord Chancellor said: "If the House of Lords had thought that there existed a case in which principle and equity required the interference of this Court, the fact of the Company, *though domiciled abroad, having agencies and property in this country*, might have influenced the House to act by securing the property". (page 333).

These two decisions are directly contrary to Justice Fletcher's judgment. It is submitted with great respect that that learned Judge failed to appreciate correctly the judgment in the *Carron* case (2). While attempting to apply the principle laid down by Lord Cranworth in that case, he has been misled by the expression "within its jurisdiction" used by the Lord Chancellor. That expression it is submitted does not mean that the party against whom the order is to be made must necessarily be "personally" within the Court's jurisdiction as interpreted by Fletcher J. It is sufficient if there exist circumstances which will give the Court jurisdiction to make the order effectual in case of disobedience. This is evident from the passage quoted above from Lord Cranworth's speech in *Maclaren v. Stainton* (1) which was decided very shortly after the *Carron* case (2) and which was in fact an off-shoot of that case. The end of the two passages from Lord Cranworth's speech quoted by Justice Fletcher in the *Vulcan Iron Works* case (3) does not bear out his conclusion. The Lord Chancellor was there dealing with the circumstances urged by the respondents in favour of upholding the injunction and was traversing their arguments. In fact immediately before that, the Lord Chancellor says "The circumstance that the appellants (i. e. the foreign Company who had been enjoined) have property in this country which may be attached or sequestered, enables the Court to make any injunction it may issue effectual (p. 442)—a proposition directly in conflict with that laid down by Fletcher J.—and then he proceeds to add that that circumstance would not in itself justify the issuing of an injunction otherwise unjust or inexpedient.

• The fact is that the *Carron* case (2) was decided on the particular circumstances of that case and the injunction was dissolved not because the Company was domiciled abroad and not within jurisdiction but because "here those circumstances do not arise which call for or justify that interposition" (per Lord Brougham p. 446). This view was pressed upon the Court by Counsel for the applicant in *Jumna Dass v. Haricharan Dass* (4) but was not accepted by Stephen J. No doubt in certain earlier cases, e. g., *Bushby v.*

(1) (1855) 26 L. J. Ch. 332.

(2) (1855) 5 H. L. C. 416.

(3) (1906) L. L. R. 38 Cal. 233 (235).

(4) (1911) L. L. R. 38 Cal. 405.

*Munday* (1) and *Lord Portarlington v. Soulby* (2) there are passages which lend support to the view held by Fletcher J. It must however be remembered that "the generality of the expressions found in a judgment are not intended to be expositions of the whole law but are governed and qualified by the facts of the case" *Quinn v. Leatham* (3) and in both these cases the defendants were personally within the Court's jurisdiction. Moreover the fact that in spite of *Lord Portarlington v. Soulby* (2) having been cited both by the appellant's Counsel and by himself in his speech in the *Carson* case, (4) the Lord Chancellor lays down the principle that existence of the property within the Court's jurisdiction was sufficient to make the order effectual (p. 442) shews the trend of the more recent decisions.

The Bombay High Court in *Mulchand Raichand v. Gill & Coy* (5) appears to have taken the view urged by the writer that it is not necessary that the party against whom the order for stay is to be made, should be personally within the Court's jurisdiction before the Court can make an order for stay of suit.

In the last mentioned case as well as in *Mungle Chand v. Gopal Ram* (6) the decision proceeded on the Court's jurisdiction to make the order which undoubtedly it had but it does not appear that the Court considered the question of how it could make its order effective in case of disobedience as the party adversely affected by the order was outside its jurisdiction and no property was shewn to be within jurisdiction which could have been attached. In *Salamchand Kannyram v. Joogul Kissors Ramdeo* (7) an attempt was made to get the High Court to issue a warrant of arrest for contempt of Court against a person in the Mofussil and to have the warrant executed through the agency of a Mofussil Court reliance being placed on section 136 of the Civil Procedure Code for this purpose. The attempt however proved abortive and the question was left open whether section 136 was applicable in cases of contempt. It is arguable that an order for arrest for contempt of Court is an order made under section 151 of the Civil Procedure Code and therefore attracts the provisions of section 136. If this view be accepted then the High Courts in India, unlike the English Courts will not be troubled in considering whether the party against whom the order is to be made, is or has property within jurisdiction.

(1) (1821) 5 Madd. 297 at 307.

(3) (1901) A. C. 495, 506.

(5) (1919) I. L. R. 44 Bom. 283.

(7) (1927) I. L. R. 55 Calc. 777.

(2) (1834) 3 My. & K. 104 at 108.

(4) (1855) 5 H. L. C. 416.

(6) (1906) I. L. R. 34 Calc. 101.

• This inherent power to order stay of suits is only exerciseable like the general principles of "justice equity and good conscience" in cases for which no specific rules exist : *Ram Coombar Coomdeo v. Chunder Canto Mookerjee* (1), *Ghansavi v. The Allahabad Bank Ltd.* (2). If a statute contains express provisions for stay of proceedings, they must be strictly complied with and this inherent power is taken away by necessary implication. Thus it has been held by the Bombay and Calcutta High Courts that the express provisions regarding stay of proceedings contained in the Presidency and Provincial Insolvency Acts coupled with the wording of section 18 of the former Act is a bar to a Judge sitting in Insolvency in a Presidency Town from ordering stay of proceedings against the same insolvent pending in a District Court : *Re Naginal Maganlal Jaichand.* (3) ; *Sarat Chunder Pal v. Barlow & Co.* (4).

Bar Library,  
High Court, Calcutta. }

N. R. Mehta.

(1) (1876) L. R. 4 L. A. 23, (50).

(2) (1914) I. L. R. 44 Cal. 929 (936-37) ; 26 C. L. J. 49.

(3) (1925) I. L. R. 49 Bom. 788.

(4) (1928) 33 C. W. N. 15.

## REVIEW.

**Procedure in Execution and Miscellaneous Matters** by Nirmal Kumar Sen, M. A., B. L., and Anil Kumar Das Gupta B. L., published by M. C. Sarkar & Sons, Calcutta.

Any legal practitioner knows that the difficulties of a litigant really commence after his client gets a decree in a British Indian Court. In spite of many salutary provisions in the Civil Procedure Code, execution proceedings are awfully protracted and tardy justice in the enforcement of the decrees renders infructuous the fruits of judgment in very many cases.

The work under review contains fairly comprehensive annotations on the longest Order in the first schedule of the Civil Procedure Code, namely, Order 21, as well as on sections 47, 60, 73 and 145 of the same Code. There is a fairly good collection of case-law also on cognate provisions in various statutes, for example, sections 7, 19 and 20, as well as article 182 of the Indian Limitation Act and some sections of the Bengal Tenancy Act. A chapter on arbitration, through and out of Court gives the finishing touch to this work.

We have no doubt that this book dealing with the subject of execution of decrees in all its aspects and bearings will be of use to all sections of the legal profession.

## NOTES OF CASES.

*Instalment decree—Payment in Court not the only course—Date for payment expiring on Court holiday—Payment on the re-opening day—Payment, if valid.*

I. L. R. 51 All. 527.

1928.

Kunj Bihari  
v.  
Bhadeshri Prasad.

P sued D on the basis of two mortgage bonds. The suit however was compromised and five instalments were fixed, first one payable with interest on the 15th June 1924. There was an express provision that in default of payment of any instalment it was to be paid in a lump sum. There were further provision in the decree which showed that the effect of the regular payment would be to prevent the mortgagees from bringing any suit to recover the amount due on the decree. The first instalment was not paid on the 15th of June 1924 and the Civil Court was closed on that date. A tender however was actually filed on the 3rd of July, when the Court re-opened. P accordingly started the present action to recover the whole amount due on the decree. Question arises whether there was any default on the part of D.

Held (*per Sulaiman and Kendall, JJ.*) that inasmuch as D had the power to make the payment direct to the mortgagees, and depositing in Court was not the only course open to him, D was not entitled to take advantage of the circumstance that the Civil Court was closed on the specified date.

*Muhammad Jan v. Shism Lil* (1) distinguished.

R. M.

(1) (1923) I. L. R. 46 All. 328.

*Hire purchase agreement—Default in payment of instalments—Time extended—Discharge of surety as a whole.*

[1929] 2 K. B. 256.

1929.

Midland Motor  
Showrooms Ltd.  
v.  
Newman.

On the 6th July 1927, the Company made a hire-purchase agreement with T with reference to a Renault Car. Payments by T under the agreement were guaranteed by Mr. Newman.

T made default in payment of three monthly instalments, totalling £ 42. 10s. (November 1927 to January 1928).

On February 3, 1928 T wrote to the Company offering a cheque for £ 20 drawn by a friend in part payment. On February 4 the Company wrote accepting the cheque and asking for payment of arrears within one month.

The cheque was sent to the Company but the arrears were not paid.

In an action by the Company against Mrs. Newman, held, (*per Atory, J.*) that there was a contract by the Company to give time to T, and the surety was entirely discharged, inasmuch



as the liability for payments under the hire purchase agreement was one and indivisible and could not be severed. The contract was one for hire of a motor car and consisted of interlocked and indivisible stipulations and as the arrangement between the creditor and the principal debtor had altered the position of the surety, she was wholly discharged. The Court of appeal (*Lord Hanworth M. R., Lawrence L. J., and Sankey L. J.*) upheld the judgment of Avory J.

N. C.

### OUR NEW JUDGE.

We desire to tender our sincere congratulations to our Senior Government Pleader, Rai Bahadur Surendra Nath Guha on the occasion of his elevation to the Bench.

Mr. Guha is the eldest son of the late Rai Bahadur Aswini Kumar Guha, who was well-known in the Judicial Service of Bengal. He received his early education in the Metropolitan School and then joined the Presidency College, Calcutta where he graduated with Honours in English in 1895. In 1898 he took his M.A. degree in English and in 1900 he was enrolled as a Vakil of the Calcutta High Court. In the early days of his practice he had splendid opportunities of working with the late Sir Asutosh Mookerjee who was then one of the leaders of the Bar. He gradually built up a lucrative practice and in 1908 when he was offered the Government Pleadership of Midnapur he declined to accept it as his father and the late Sir Asutosh Mookerjee both desired that he should continue his activities in the Calcutta Bar. In 1920 he was appointed Assistant Government Pleader, High Court in which capacity he continued till 1924 when he officiated as Senior Government Pleader. He officiated as Senior Government Pleader several times and was finally confirmed in that appointment in 1927.

He is known as a careful, conscientious and painstaking lawyer and has enjoyed throughout his professional career the confidence of both the Bench and the Bar which is now fully justified by his elevation to the Bench.

The appointment of Mr. Guha is sure to be received with universal satisfaction as his sweet temper and devotion to duty are familiar to all. We may confidently look forward to a career of useful work in the administration of justice.

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NO. II.

## The Technicalities of Damdupat reconsidered and reconciled.

An important and interesting question which is likely to crop up in Courts very often is, whether a creditor can in a suit for the recovery of principal and interest against a Hindu debtor, include the whole interest payable in the same suit or he is entitled to bring a separate suit for the matter of that whenever the interest due exceeds the principal even in spite of the Rule of Damdupat, or he is entitled to neither of the courses. The decisions of different High Courts in India are not at all definite and unanimous on the point and the question as to its recoverability by a suit, is still flickering on the horns of the dilemma. Although many pertinacious lawyers have racked their brains to convince the Court that interest exceeding the principal is not altogether irrecoverable by an action in the Court, it is a matter of regret that they have not been able to succeed in their attempts to secure a ruling up till now. A large majority of them seem to be even now under the delusion that so far as a Hindu debtor within certain specified areas is concerned, the liability to account for the exceeding interest is altogether dispensed with by our Courts.

It would be out of place here to deal with the questions as to whom the rule applies and also as to the local extent of its applicability together with the question of limitation for such suits and so it is submitted that the whole discussion should be presumed to apply to cases coming within its purview.

Then what is meant by the rule of Damdupat and what are its special characteristics? It is a branch of the Hindu Law of debts in its inception. It was intended as a measure against the practice of usury. Its predominant aim was to put certain limitations on the recovery of the amount of interest at a single time. According to this rule the amount of interest recoverable at any one time cannot exceed the principal. Even though the rule now in force has undergone considerable changes by judicial decisions, it has not reached

its perfection as yet. Some of the commentators say that arrear of interest cannot exceed the principal and so it is not recoverable at all whereas the rest think that it simply cannot be recovered at the same time but may even exceed the principal. The same divergence of opinion exists between the different High Courts and sometimes between the judgments of the same High Court. Before proceeding further it is essential to see whether the way is clear of this obstacle.

On a careful perusal of the texts, one cannot fail to notice that a number of different limitations of interest are prescribed for different objects and sometimes the interest recoverable on some of them is not the same according to the different commentators. Hence the rule that "No arrear of interest greater than the principal can be recovered at all," would have no strong foundation whatsoever, in view of the fact that interest used to accumulate up to twice, thrice, four times, five times and also eight times according to the nature of the debt payable under the old law. So then the remark made by Sausse C. J. in *Dhondu v. Narayan* (1), that "No greater arrear of interest can be recovered at any one time than what will amount to the principal sum" is really efficient and up to the mark. The words "No greater arrear of interest" are really very significant. They obviously convey the meaning that arrear of interest does not stop on becoming equal to the principal but goes on running in spite of that and the only penalty is that it is not recoverable at the same time. By the rule of Damdupat, interest exceeding the principal is not recoverable at any one time. The words "Exceeding the principal" do clearly imply that interest may increase to such an extent as to even outgrow the principal. They do not simply mean that interest recovered at different times taken together may exceed the principal, but they also include the interest which may at any one time of recovery exceed the principal. In *Ramcensus v. Jakurlall* (2), a direct question on the point came up for decision and it appears to be the only case of its kind. In the course of the judgment in this case, it was observed by Wilson J., "I think it is also well settled that by Hindu Law arrears of interest more than sufficient to double the debt are not recoverable." We will see later on whether such interest is recoverable or not, but the fact that arrears of interest can exceed the principal may be noted from this. So then, this much is sure and certain above all, that the running of interest does not stop on

(1) (1863) 1 Bom. H. C. R. 47.

(2) (1880) 1 L. R. 5 Calc. 867.

becoming equal to the principal but goes on even though allowed to remain in arrears.

We are now in a position to realise that interest does exceed the principal even if it is not recovered before it exceeds the latter. Up till now there are a number of recognised ways according to which interest exceeding the principal is allowed to be recovered. Such interest is allowed to be recovered at different times up to any amount, provided that the interest recovered at one time does not exceed the principal. Again there are a number of decisions which permit the capitalization of interest before it exceeds the principal, by a fresh agreement between the creditor and the debtor, so that it then amounts to a new cause of action and can be the subject matter of a suit before it redoubles. And there are decisions too, to the effect that where a suit has been instituted to recover a debt, the rule of Damdupat ceases to apply. These are some of the manners in which interest exceeding the principal could be recovered up till now. Whether or not there are any other modes of recovering such interest is a question so keen and unsettled as yet, that in spite of a long line of decisions it has not been found to be conciliatory but is giving vent to a good deal of controversy among the members of the legal profession and has created since long, a sort of disappointing sensation among the money-lenders. Within the compass of this article it is proposed to discuss how the difference of opinion can be harmonized as far as possible and to what extent the technicalities can be done away with, so as to place the question in full view of the Bench and the Bar as well.

First :—Let us see whether interest bigger than the principal can be capitalized in view of the fact that it is supposed to be not recoverable at once in the course of the same suit and also a separate suit for the surplus interest is said to be barred. There can be no denial as to the validity of an agreement by which interest up to the amount of the principal sum can be capitalized and from that time both of them go on bearing interest as if the capitalized interest was originally a part and parcel of the principal. If the debtor were to agree to the capitalization of interest also which exceeds the principal, would it make any difference and is the creditor barred from recovering the whole of it by a suit with due interest thereon, at one and the same time before it redoubles, in case the debtor refuses to pay it up? It has been definitely laid down by this time that whatever amount of interest equal to or less than the principal is in arrear, can be principalized by an agree-

ment, according to which the joint principal will begin to carry interest at the agreed rate from the agreed time. Apart from the texts which are not quite reliable on the point, if the question is considered in the light of up to date case law, it does not show any disinclination to the recognition of the legality of such an agreement, even though there is no decided case on the point. In *Ramcunney's* case (1) it was remarked that the rule of Damdupat is rather a rule of limitation and has nothing to do with the legality or illegality of any contract. Shah J. in the course of the judgment in *Khimji v. Chumilal* (2), at page 426 says "I desire to add with reference to the rule of Damdupat that it requires that the interest in the course of one transaction shall not exceed the principal. But it does not prevent an agreement between the debtor and the creditor to capitalize interest at a stage when the interest does not exceed the principal." His Lordship means to say that arrears of interest cannot exceed the principal in the course of one transaction and the capitalization of interest is only permissible before it exceeds the principal. The judgment is not an exposition of any further development of the law. It simply lays down a principle in effect much older than the one enunciated in *Dhendu v. Narayan* (3), and although *Khimji v. Chumilal* (2), is of a later date, its position in Indian case law appears to be much anterior to that of *Dhendu v. Narayan* (3). If by a private arrangement any amount of interest even exceeding the principal sum can be recovered at different times and by a fresh agreement, interest not exceeding the principal can be capitalized and recovered, before it redoubles, even though at the date of its actual recovery both the interests taken together would be much bigger than the original principal and also interest greater than the principal is allowed to be recovered in the case of judgment-debts, it may be supported on principle that the capitalization of interest also which exceeds the principal by a fresh agreement is neither expressly forbidden by the texts nor is it prohibited by judicial decisions. Capitalization of interest implies that the whole principal and interest thereon is paid up at once and a fresh loan is simultaneously taken from the date of the new agreement, as if no debt was payable before or as if it has been discharged already. In case a debtor willingly pays up the principal and the interest as well even though the latter has exceeded the former, the law of Damdupat becomes absolutely

(1) (1889) I. L. R. 5 Cal. 567.

(2) (1918) 21 Bom. L. R. 419.

(3) (1863) 1 Bom. H. C. R. 47.

helpless in the matter. So also it cannot prevent a debtor from capitalizing the exceeding interest also, if he is ready and willing to do it and from that time it ought to bear interest exactly like a fresh loan, because by entering into new contract according to which interest exceeding the principal is transformed into capital, it amounts to an actual discharge of the old obligation in law and an entirely new loan is as it were advanced from that date. That it should then carry interest at the contract rate and a suit ought to be maintainable for its recovery, in case the debtor refuses to pay, stands to reason.

Secondly :—Let us see whether the exceeding interest is recoverable in case the principal and interest equal to that is paid up as such and the remaining promised at a future date, nay, let us even go to the length of saying that it is refused. For instance A owes B Rs. 1000, Rs. 400 being the principal advanced and the remaining Rs. 600 being the arrear of interest payable thereon. A makes a payment of Rs. 800 to B towards the debt. In case A does not give any direction according to which the payment of Rs. 800 is to be appropriated, B has a discretion to appropriate this payment in full satisfaction of the interest and in part satisfaction of the principal. But on the other hand, if A, who has the primary and preferential right of appropriation, indicates that Rs. 400 should be received in full satisfaction of the principal and the remaining Rs. 400 towards the interest due, B has no other alternative as he is bound to appropriate it in a manner indicated by the debtor. In such a case, is B competent to sue for the remaining Rs. 200 if A refuses to pay? If interest is charged at a reasonable rate making the transaction in all other respects, what is called in common parlance, a conscionable bargain, neither Damdupat nor the usury laws would preclude the recovery of such interest. Damdupat cannot interfere with the right of a creditor in such cases to recover the remaining interest at a different time altogether even by a regular suit, because there is not even a single authority to show that a debt is completely extinguished on payment of the principal and interest equal to that, at one and the same time.

Thirdly :—Supposing for a moment that interest bigger than the principal as well as the principal sum remain unpaid, is one suit maintainable for the recovery of principal and interest equal to that and the other at a different time for recovering the exceeding balance of interest or is there any bar of Order 2, Rule 2 of the Civil Procedure Code? Since the recovery of a debt by a suit is one of the ways of receiving payments, we do not see any reason

why one suit for recovering the principal and interest equal to that and the other at a different time for the recovery of the remaining interest, should not be maintainable. Let us now consider as to the maintainability or otherwise of the second suit in view of the provisions of Order 2, Rule 2. Rule 2(1) says that every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action. But it is submitted that although a creditor's claim extends in such cases to the principal and the whole of interest whenever the latter exceeds the former also, he is only entitled to make in respect of the claim, a demand for the recovery of principal plus interest equal to that, on account of the rule of Damdupat. He cannot in the same suit claim to recover the remaining interest at the same time. Rule 2 does not ask a plaintiff to renounce his claim or part of his claim in case he has no right to sue for it, at the same time as the other, that is, when he is prohibited from recovering the remainder of interest at the time of receiving the principal and interest equal to that, even though his claim to recover such interest arises out of the same cause of action. In a case where arrears of interest exceed the principal, the whole claim to recover at the same time in the course of a single suit can be only principal and interest as big as that. What about the residue if at all the plaintiff wants to recover? Rule 2(1) further says that a plaintiff may relinquish any portion of his claim in order to bring his suit within the jurisdiction of the Court. What would happen if the plaintiff does not want to relinquish any portion of his claim and the Court also has jurisdiction to entertain the whole suit at once? That the plaintiff omits to sue in such cases for the whole claim, is not because he has an intention to drop his claim for the residue, or because the Court has no jurisdiction to entertain the whole suit at once or because he does so through negligence or oversight, but he is compelled to do so simply on account of the inflexibility of the law of Damdupat, which does not allow him to recover it all at once. Rule 2 does not dictate in clear terms that when as a matter of compulsion, a plaintiff cannot include his whole claim for relief at the same time, even though it arises out of the same transaction, a separate suit for the remaining relief is absolutely barred. Clause 2 of Rule 2 says that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. In the case of recovering the residue of interest by a separate suit, plaintiff does not voluntarily omit to sue for it in the first suit nor

does he relinquish the portion so omitted in the first suit. According to Damdupat he is simply barred for a time from recovering the remaining and he simply wants to reserve his right to sue to a future convenient date. It appears that the right to sue for the remaining interest is merely suspended for a time and has its remedy in the form of an independent suit. If the right to the relief in respect of which a further suit is brought did not exist or was merely suspended at the date of the institution of the former suit, the subsequent suit cannot be barred by Or. 2, R. 2. Therefore a second suit in such cases is perfectly maintainable.

Fourthly:—Let us see if there is any prohibition throughout the whole Code of Civil Procedure for a creditor to sue for the whole principal and interest due, even though the latter exceeds the former, praying for a decree to be entitled to recover the principal and interest equal to that by one instalment and the remaining by another instalment at a different time. Simply by bringing a suit for the recovery of the whole debt at once, a creditor cannot be accused of actually recovering it at once. At the most he has simply taken a step to recover it by instalments. Damdupat does not bar a creditor to take measure to recover the whole interest, but it only forbids him to actually recover it all at once. In case a creditor seeks to recover the whole of it by a suit in two separate instalments, he cannot be guilty of a wilful evasion of the law of Damdupat. The Court is also on the other hand empowered by Or. 20, R. 11 of the Civil Procedure Code, to direct a payment of money at the time of passing a decree, by instalments for any sufficient reason. It is also empowered to postpone the payment of the amount decreed in a fit case. If the Court can postpone the payment of the whole amount decreed, it can also postpone the payment of a part of the decretal amount for a sufficient reason. Whenever a creditor sues for the principal and the whole of interest due, although the latter has exceeded the former at the date of the suit, the Court is competent on being so requested, to grant two separate instalments and postpone the payment of the second instalment for a reasonable time, since the bar of Damdupat to recover the exceeding interest at once, is a good and sufficient reason for the same.

In *Ramconroy v. Johurlall* (1) a straight question on the point came up for consideration. In that case the plaintiff brought a suit for the recovery of Rs. 1101/- and odd due on a pro-note for Rs. 400/- with interest at the rate of 5% per mensem.

Wilson J. in the course of the judgment said "I think it is also

(1) (1880) I. L. R. 5 Cal. 867.



well settled that by Hindu Law, arrears of interest more than sufficient to double the debt are not recoverable." He further said "As then no statutory provision has been pointed out controlling the Hindu Law in the matter, I think I am bound to apply that law to the present case. And the decree will be for the principal and a sum of interest equal to the principal, in all Rs. 800/-." We think that Or. 2, R. 1 & 2 and Or. 20, R. 11 sufficiently control the law of Damdupat. So far as the facts of this particular case are concerned, it is a perfectly sound and reasonable judgment. The plaintiff in this case did not reserve his rights to bring a separate suit for the exceeding balance of interest, nor did he pray for a decree to be allowed to recover the total sum by two separate instalments in the order mentioned above. So, Wilson J. was fully justified in awarding interest only up to the amount of the principal claimed. Another remarkable feature of the case is that the plaintiff was awarded an amount of interest which no Court can possibly allow after the passing of the Usurious Loans Act 1918. One more thing worthy to be noted is, that Wilson J. has laid down that arrears of interest more than sufficient to double the debt are not recoverable. His Lordship does not say that interest in the course of that transaction could not have exceeded the principal at all. He only prescribes the limit, according to Damdupat, upto which interest may be recovered in the course of the same suit at once. If it can exceed the principal at all, there must be some way to recover it; otherwise there is no propriety of its exceeding the principal. We would say that it is not a correct interpretation of the rule. According to this rule interest exceeding the principal is not recoverable at the same time. If Wilson J. were to say that it is not recoverable at all, it is redundantly opposed to the fundamental principles of Damdupat. We believe that a suit for the whole sum is perfectly maintainable if the creditor seeks to recover the principal and interest equal to it by one instalment and the remaining interest by the other.

Fifthly :—Assuming for the sake of argument as according to some decisions, that interest does not exceed at all in the course of one transaction if allowed to remain in arrears, or it is not recoverable even though it can possibly exceed as according to the others, we are induced to see if there are any other methods by which it can be lawfully recovered.

By the rule of Damdupat, *interest exceeding the principal is not recoverable at the same time*. It means that *the residue of interest is not recoverable as interest only* and 'nothing more'. It is not

possible to conceive how it cannot be recovered *as for possession and use* of the creditor's money from the time the principal ceased to carry interest, simply on account of a notional technicality. The decision of the Bombay High Court in *Ramachandra v. Tama* (1), is exactly bearing on the question. In that case plaintiff left her interest in certain saltpans to defendants for two years on a rental of Rs. 1000/- per year; the rent note passed to her was not registered. She then sued to recover the rent of the two years at the rate of Rs. 1000/- per year. The defendants admitted the plaintiff's ownership as well as their tenancy under her, but disputed the amount of rent. It was held (1) that the plaintiff could not be allowed to rely on the lease set up by her, because it was not registered, nor could she be allowed to give oral evidence of the lease; (2) that the defendants having admitted the plaintiff's ownership and their tenancy, proof of the relation of land-lord and tenant became unnecessary; (3) and that the plaintiff could only recover *as for use and occupation* for the two years of the tenancy admitted and that she could recover the amount claimed by her as it was shown on evidence not to be excessive. On the same principle if the exceeding interest cannot be recovered as interest, on account of a technical defect in the Rule and the defendant admits his position as a debtor but contends that he is not responsible to pay the remainder of interest, it can be fairly deduced that the debtor in such cases is liable to satisfy the demand of his creditor *as for possession and use* of the latter's money at the contract rate of interest, up to the time of actual payment, in case that rate of interest is not found to be excessive. The Rule does not seem to preclude a creditor from recovering by an action in this way, at the usual rate of interest from the time it equals the principal.

Sixthly :—There does not appear to be any objection to recover such interest *as mesne profits* from the time interest overtakes the principal. Mesne profits of property means those profits, which a person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits. The recovery of mesne profits as it appears from the definition, is not restricted to the wrongful possession of immoveable property only, but applies to that of moveable property as well. If A lets his house to B for a period of one month at a rental of Rs. 20/-, and B holds over even after the termination of his tenancy, his posses-

(1) (1912) 14 Bom. L. R. 390.

sion cannot be but wrongful and he will have to pay *mesne profits* till he delivers over possession of the house, at least at the rate of Rs. 20/- per month, because that is the least amount of rent which A would otherwise have probably obtained, had he leased it out to some one else. So also in such cases it cannot be disputed that the *holding over* of the creditor's money at a time when he is unable to recover the future interest as soon as it equals the principal, *cannot be a rightful possession thereof*, at least from the date on which one equals the other, if not earlier. The *profits* which a debtor in wrongful possession of the creditor's money has actually received or might with ordinary diligence have received therefrom, is the amount of interest which the creditor would otherwise have obtained or the debtor would otherwise have been liable to pay, but has wittingly saved on account of the rigidity of *Damdapat*. A debtor's liability for *mesne profits* is not discharged if he simply pays the interest at the contract rate, but he will have to pay interest on such interest as *mesne profits* include the interest on such profits. It therefore seems that such exceeding balance of interest at least is recoverable as *mesne profits* for wrongfully possessing and using the creditor's money after it ceased to carry interest.

Seventhly :—It is our duty to see if such surplus interest can be recovered as *compensation for breach of an agreement* to return the whole debt before the interest due exceeds the principal. If a debtor makes part payments of interest at times so as to keep the debt within limitation and allows the arrears of interest to accumulate, till it equals the principal, he is bound to be answerable in compensation, for the interest which would otherwise have been payable to the creditor, in case he had stipulated to that effect. For example, A borrows Rs. 100/- from B on a simple mortgage at the rate of 12% interest per annum. He promises to pay it on demand with due interest and also stipulates that in case he fails to repay the principal and interest before the accumulation of the latter exceeds the former, *he would be liable to compensate B for any loss of interest likely to be sustained by the breach*. During the continuance of the agreement, accumulation of interest happens to equal the principal and B comes to know of it some-time later. Is not A liable to compensate B for breach of the contract entered into with full knowledge of his liability in the matter? The fact that B refrains from taking action before that time is not at all material because, he is not bound to sue at any particular time so long as he is within limita-

tion. Whether he goes to Court on the first day or the last day or any other intermediate day within the period of limitation, it is all the same and his rights are not at all affected thereby.

According to section 74 of the Contract Act, "Where a contract is broken, if a sum is named in the contract as the amount to be paid in case of such breach,—the party complaining of the breach is entitled whether or not actual damage is proved to have been caused thereby, to receive from the party who has broken the contract, reasonable compensation not exceeding the amount so named..." So then, if a debtor fails to repay the loan before interest equals the principal, it plainly amounts to a regular breach of the contract whether or not the creditor has sustained any damage thereby. That the creditor has sustained actual damage in such cases cannot be denied and therefore he is entitled to recover *compensation* at least at the contract rate of interest, in view of the fact that such interest is said to be not recoverable on account of the Rule of Damdupat. The amount so named in the above illustration as to be recoverable in case of the breach mentioned, is quite reasonable since it only entitles the creditor to recover *a fair amount of compensation* which he would have obtained as interest, had he lent it out to some one else or invested it in some other way. It is therefore submitted that there appears to be no objection to recover such interest *as compensation for breach of an agreement* whenever there is a condition to that effect.

And lastly :—Is it recoverable or not *on grounds of justice, equity and good conscience*, assuming for argument's sake that all the remedies suggested above are not recognised? That interest exceeding the principal is not recoverable, is indeed a wrong without a remedy. Damdupat allows a creditor to receive compound interest by an agreement for capitalization; it does not apply to judgment debts since interest exceeding the principal is often permitted to be recovered at the time of passing a decree. If the law permits compound interest to be recovered, it is reasonable that it should also allow the recovery of simple interest on grounds of equity, as in the latter case, the total debt to be recovered would be obviously smaller. Again the old law of Damdupat did not conceive that its application would not be extended to judgment debts. Even though the judgment-debt loses its characteristic of a contract from the date of the decree, there is no reason for withholding its application, as it never-the-less remains a debt even after that date. If at all the Rule of Damdupat is intended to be

given full force, it must apply to all debts alike, whether they are judgment-debts or any other debts. To extend its application to one set of debts and allow the other set to go scot-free is inequitable on the very face of it. Whenever there is no express provision to remedy an evil, recourse is often had to justice, equity and good conscience. It is really unjust to disallow only simple interest to be recovered when a wholesale license is given for recovering compound interest on certain conditions. It is most inequitable and opposed to the dictates of good conscience that its privilege should be given to one class of debts only whereas its extension to the other class is thoughtlessly withheld, having disregard to the incalculable amount of injustice that would result.

Besides that the Rule is made applicable only to a limited class of debtors, in limited areas. It applies only to one set of Hindu debtors whereas it is not extended to the Hindu debtors of the other Provinces, who are governed by the same Hindu Law in such matters. As a matter of justice, equity and good conscience the same privilege ought to be extended to the Hindus of other Provinces also or it should not be given to either of them. It is a matter of regret that its advantages are not bestowed upon Non-Hindu debtors, who very much resent being excluded from them. The Hindu debtors of the other Provinces, as well as all Non-Hindu debtors envy those who are governed by Damdupat. The creditors who are governed by it are at a loss to know how to get out of the difficulty. The creditors outside such Provinces who used to be quite easy up till now are watching with fearful emotions as sudden changes are so often introduced by legislation, when the devil of Damdupat will infect their Provinces. And the position of those Non-Hindus to whom only the liabilities are extended as creditors, but not the privileges as debtors, is pitiable indeed. The whole class of creditors is breeding a sort of indignation at the inequitable privileges granted to debtors governed by Damdupat. In the light of these circumstances, it would be in the name of justice, equity, and good conscience, either to amend the law by extending the right to all the Indian debtors alike or to repeal its unwarrantable application to a limited class in a limited area.

Besides that the law of Damdupat was originally intended as a measure against the practice of usury. Since the passing of the Usurious Loans Act, its purpose is more efficiently served by the provisions of the Act, and so it has no business to remain as a part of the law any longer. Or in case its purpose was to stop the accumulation of interest at a certain point that is as soon as the

arrears of interest equal the principal, but was not intended to stop the lending of interest at an exorbitant rate, it completely conflicts with the provisions of the Usurious Loans Act, and in that case, either the one or the other will have to exit from the existing law, and preferably the Rule of Damdupat, in as much as it probably allows an abnormal rate of interest to be charged. Damdupat does not appear to have regulated the rate of interest chargeable on a debt. And in case the fundamental principles of Damdupat are to stop usury as well as the accumulation of interest at an abnormal rate, beyond a certain limit, it is working contrary to justice, equity and good conscience, since it does not permit the realization of easy simple interest in case it happens to exceed the principal, but at the same time allows compound interest to be recovered from the moment it is capitalized. Under any circumstances, Damdupat requires a complete revision or repeal. A law whose purpose is not fully defined and settled or which is working against the principles of equity, and justice, stands condemned by all and ought to be properly revised or completely repealed since it acts as a hardship to one of class of people and gives unnecessary and excessive indulgence to a limited few by encouraging them to contract debts and to neglect to discharge them at or before the proper time.

Gadag, }  
Bombay }

D. G. Kurthoti.

## NOTES OF CASES.

*Arbitration—Application to revoke submission—Appeal—Matter of practice and procedure.*

An application was made by one party (the Buyers) to revoke a submission to a particular arbitrator.

The Master refused the application. The Judge (*Finlay, J.*) upheld the Master.

The Buyers appealed to the Court of appeal. The other party (the manufacturers) contended that the Buyers came to the wrong Court and ought to have appealed to a Divisional Court.

Held, (*per Scrutton, L. J., Greer, L. J. and Sankey, L. J.*), that an appeal from a Judge at Chambers refusing leave to revoke a submission to arbitration is in "a matter of practice and procedure"

[1929] 2 K. B. 266.

1929.  
Symbro Trading Co.  
v.  
Posograph  
(Parent)  
Corporation.

within Sec. 31(3) of the Judicature Act 1925, and therefore, lies to the Court of appeal and not to a Divisional Court.

The result of the series of cases on this topic, *Scrutton L.J.* observed, was not creditable to English jurisprudence.

The unfortunate state of English procedure requires the immediate attention of the Rule Committee.

The Court of appeal followed *In re Colman and Watson* (1).

N. C.

(1) (1908) 1 K. B. 47.

[1929] 2 K. B. 316.

1929.

Berry  
v.  
Berry.

*Contract—Variation by unsealed writing—Judicature Act, Sec. 25(11).*

By a deed of separation, dated March, 4th, 1920, the husband covenanted to pay a monetary allowance to the wife.

By an agreement in writing not under seal, dated June, 25th, 1928, the parties varied the terms of the earlier deed in certain respects.

In March, 1929, the wife instituted proceedings claiming arrears of allowance under the deed.

Under the common law a covenant in a deed cannot be varied by a simple contract or by a subsequent written agreement not under seal. It has not been altered by the Judicature Act.

In equity, however, the rule has always been that a simple contract which varies a deed is a good defence to an action on the deed.

Here was again the familiar old conflict between common law and equity.

*Swift J.* held that the rules of equity must prevail. Under Sec. 25 (11) of the Judicature Act, 1873, whenever there is a conflict between the rules of equity and the rules of the common law, the former shall prevail. This provision has been re-enacted by Sec. 44 of the Judicature Act, 1925. *Acton J.* agreed with *Swift J.*

Therefore, the plea by the husband of the simple contract of 1928 was a good defence to the wife's action under the deed of 1920.

M. C.

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## CONTRIBUTORY NEGLIGENCE.\*

One would have thought that by now the law as to contributory negligence would be clearly settled, but the recent decision of the Court of Appeal in *Service v. Sundell* (1), would seem to show that questions of difficulty are still liable to arise on this somewhat difficult subject.

In the above case, an action for damages for personal injuries had been brought against the defendant, and the jury found that there was negligence on both sides, but they were unable to agree on the question as to which negligence was the greater, or as to whose negligence was really responsible for the accident, the foreman of the jury subsequently adding that both parties contributed to the accident. In these circumstances the learned Lord Chief Justice held that judgment could not be entered for either party. From this decision the defendant appealed, contending that in the circumstances judgment should have been entered for him, but the Court of Appeal, affirming the decision of the Lord Chief Justice in the Court below, dismissed the appeal.

The point, therefore, arises for consideration, as to whether a plaintiff who has by his own negligence in any degree contributed to the accident, is thereby precluded from recovering.

There are some dicta to that effect in *Dowell v. General Steam Navigation Company* (2) where Lord Campbell said: "According to the rule which prevails in the Court of Admiralty in a case of collision, if both vessels are in fault the loss is equally divided; but in a Court of common law the plaintiff has no remedy if his negligence in any degree contributed to the accident." But this statement of the law does not seem to be in accordance with the decision of the House of Lords in *Radley v. London and North Western Railway Company* (3)

\* The Law Times (Journal)—Vol. 168, page 319, dated Oct. 26, 1929.

(1) The Times, the 22nd Oct., 1929. [(2) (1853) 5 E and B. 195, 198.

(3) [1876] 12 A. C. 754 1. 35 L. T. Rep. 637.



In that case Lord Penzance thus declared the law with regard to collisions on land: "The first proposition is a general one to this effect that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him. This proposition as one of law cannot be questioned." It is the application of these principles in practice, however, which often gives rise to difficulties.

The dicta of Lord Birkenhead in *Admiralty Commissioners v. The Volante* (1) although these were used with reference to collisions at sea, might, notwithstanding, serve as a guide in connection with the question of contributory negligence as affecting collisions on land. In that case, Viscount Birkenhead said: "Upon the whole, I think the question of contributory negligence must be dealt with somewhat broadly and upon commonsense principles, as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent..... might..... invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution."

If one were to refer now to the judgment of Lord Justice Scrutton in *Service v. Sundell* (2) it might appear that the learned Lord Justice expressed the view that a plaintiff whose negligence contributed to the accident could in no circumstances recover; but this statement of the law, it is submitted, must be read subject to the judgment of Lord Campbell in *Radley v. London and North Western Railway Company* (3) and, in any case, the dicta of the learned Lord Justice cannot be read in this way, because in dismissing the appeal the Court of Appeal impliedly, if not expressly, affirmed the view of the learned Lord Chief Justice that

(1) [1912] 1 A. C. 144; 126 L. T. Rep. 425.

(2) The Times, 22nd October, 1919.

(3) [1876] 1 A. C. 754.

plaintiff is not necessarily precluded from succeeding in an action of negligence, merely by the fact that his own negligence contributed to the accident.

It may be as well to quote Lord Justice Scrutton's words in *Service v. Sundell* (1): "If the plaintiff proved," said the learned Lord Justice, "that the negligence of the defendant caused the accident, and nothing else was proved, no difficulty arose about liability. But if negligence on the part of the plaintiff contributing to the accident were proved, the plaintiff failed." This last sentence must, however, it is submitted, be read subject to the decision in *Radley v. London and North Western Railway Company* (2). "Everything," continued the learned Lord Justice, "turned on a proper direction on what in the chain of causes contributing to the accident was the cause which contributed to it, so as to debar the plaintiff from recovering. Consequently, it became of great importance that the jury should be properly directed on the question of contributory negligence. The Lord Chief Justice asked the jury to consider what was the real cause of the accident. But juries must be warned that there might be two or even three causes of an accident. With regard to the case of a motor-car or a bicycle running too fast, and a foot passenger stepping into the road without looking where he was going, so that the motor-car could not avoid him, though it could have done so if it had been going at a reasonable speed, neither, in his opinion, should recover, because the negligence of each contributed to the accident. The negligence of the plaintiff and the defendant synchronising might both cause the accident."

(1) *The Times*, 22nd Oct. 1929.

(2) [1876] 1 A. C. 754.

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### Dissolution of Hindu Marriage on Conversion.

The decision of Panckridge J. in *Ayesha Bibi* (formerly *Padmasana Ghosh Majumdar B. A.*) v. *Bireswar* (1) has elicited an adverse comment from the pen of my learned friend Dr. N. C. Sen Gupta (50 C. L. J. 401) who while deploring the absence of the other side at the hearing of the case contends that the learned Judge has misconceived the law bearing on the case, and opines that if the other side had been represented the decision would have

been entirely different. In other words it is contended that the judgment is erroneous in law and on the following grounds :—

(1) The case comes within the terms of section 112 of the Government of India Act and therefore it should have been decided according to the personal law of the defendant which in the present case is the Hindu Law.

(2) In this case there being a conflict of personal laws the law to be applicable has to be determined by the application of the rules of Private International Law, and applying such rules it must be held that the domicile of the wife follows that of her husband and therefore the personal law of the husband i. e. Hindu Law should have been applied.

Now if the 1st proposition is correct, the 2nd becomes of academic interest only.

At the outset I shall assume with Dr. Sen Gupta that section 112 of the Government of India Act applies to the facts of the present case and that the law applicable thereto is the Hindu Law. Now, under the Hindu Law if a Hindu married woman renounces Hinduism, embraces Islam and lives like a Muslama, she goes absolutely beyond the pale of Hinduism and Hindu Law, and is counted as one dead for all purposes except perhaps for purposes of charity. In this connection, I need only quote a passage from the judgment of Sir Adam Bittleston in *Rahmad Beebe v. Rokhya Beebe* (1),—a passage which has also been quoted by that eminent Judge and jurist and I may be permitted to add the pink of Hindu orthodoxy, the late Sir Gurudas Banerjee in his *Hindu Law of Marriage and Stridhan*, 3rd Ed., page 131, *Tagore Law Lectures 1878*. The passage runs thus :—"So far, however, as Hindu Law is concerned, it seems to me enough to say that, in my opinion, a Hindu married woman who deserts her husband, becomes a convert to Mahamadanism, and adopts the habits and lives as the wife of a Mussalman, is altogether out of the pale of Hindu Law, that she ceases to have any recognised legal status according to that law which counts her as one dead or at least recognises her existence only as an object of charity. This is not inconsistent with such passages as that cited from Manu, 'that neither by sale or desertion can a wife be released from her husband' which certainly have reference to persons still within the pale of Hindu Law. It seems to me, however, at variance with the spirit of Hindu Law to hold that it concerns itself with a woman in such case, as far as to

(1) 1 Norton's Leading Cases on Hindu Law, page 12.

impose on her any obligation not to marry again, provided the second husband be not a Hindu ; and if she does marry again, the validity of that marriage must, I think, depend upon the law of the sect to which she has become a convert". Applying this principle of Hindu Law it is clear that the *bona fide* conversion of the plaintiff—her *bona fides* have not been questioned—from Hinduism to Islam with all its implications drives her altogether out of the pale of Hinduism and Hindu Law and *ipso facto* operates as her civil death and consequently dissolves her matrimonial tie, for obviously no tie, matrimonial or other, can subsist after death. In this view of the matter, it was not necessary for her to invoke the jurisdiction of the Court at all, though the peculiar circumstances of the case rendered such a step highly expedient.

In dealing with point (1) above, I had assumed for the sake of argument that section 112 was applicable. But does section 112 really apply to the facts of the present case? I submit not, and for the following reasons. Section 112 deals with two classes of rights viz. (a) matters of inheritance and succession to lands, rents and goods, and (b) matters of contract and dealing between party and party and provides for two classes of parties viz. (c) parties subject to the same law, and (d) parties subject to different personal laws, and directs the application of the same law in case (c) and of the law of the defendant in case (d). In other words the section deals with (a) inheritance and succession and (b) contract and dealing between party and party. Obviously, unless the case of a Hindu marriage is covered by (b) the section has no application. That a Hindu marriage is not a contract at all is elementary and cannot be disputed ; and the question therefore arises whether a Hindu marriage can be said to be a dealing between the bride and bridegroom. From the wording of the section it is clear that 'party' therein refers to a party in the suit or proceeding and not to all and sundry. Now, the essence of a Hindu marriage is the gift of the bride, the gift by the father of his daughter, to the bridegroom. She is not regarded in Hindu Law as a party at all to the marriage. She is regarded as a subject of the gift and not as a party to the transaction. See *Banerjee's Marriage and Stridhan*, 3rd Ed., pages 43-44 and pages 79 et seq. That being so, can it be legitimately contended that the Hindu marriage is a dealing or transaction between the bride and bridegroom so as to bring it within the pale of the section? I submit not. In the present case, therefore, when the plaintiff was given away in marriage to her quondam husband by her father or guardian according to Hindu rites there was no

dealing between her and the defendant within the meaning of this section. "If my construction of the section is correct, then what is the position? Dr. Sen Gupta does not deny that the plaintiff is entitled to the relief she seeks; on the contrary he advocates that as a matter of public policy "there should be a large scope for dissolution of unhappy marriages." He further admits that an application for such a relief could only be made under the Mahomedan Law, for no other system of law in India provides for such a relief. In these circumstances, it is manifest that there are only two courses open to the Court, either, following the principle enunciated by Sir Adam Brittleston, to decide the case according to the law of the sect to which the plaintiff has become a convert, or according to justice, equity and good conscience; and the adoption of either course will lead to the same result viz., that arrived at in this case by Panckridge J; for the rules of Mahomedan Law on this point are quite fair and liberal and it is not shown that they militate against modern notions of justice and equity. Even in case of contract the section has not been construed in its literal sense and in the case of *H. H. Asimunnissa Begum v. Clement Dale* (1) decided by the Madras High Court in its original side it was observed that the section "does not mean that whenever the defendant in a suit is an European British subject no law but the law of England shall be applied". In that case it was found that the literal construction of the section would result in obvious injustice and the case was decided according to the law of the plaintiff i.e. Mahomedan Law rather than that of the defendant which was English law. In this view of the matter there is no conflict of law so as to necessitate an excursion into the domain of Private International Law. I may here point out that even in cases where a too rigid application of the principle of domicile is likely to result in injustice, it has been held in England that "In proper circumstances the court here ought to assume jurisdiction in a wife's suit for divorce by treating her as having a domicile of her own sufficient to support such suit" See *Westlake*, 7th Edn., page 89 citing *Statkatos v. Statkatos*. The cases of *Lord Advocate v. Jeffrey* (2) and *Ex parte Mir Anwaruddin* (3) cited by Dr. Sen Gupta in support of his argument have no application to the facts of the present case and are of no assistance to the solution of the question which arose in the present case. In the former case it was held: "that

(1) (1868) 6 Mad. H. C. Rep. 455 (474)

(2) [1921] 1 A. C. 146.

(3) [1917] 1 K. B. 634.

in the absence of a decree for judicial separation the conduct of the husband which would have enabled the wife to obtain a decree, if she had applied for it, cannot after his death be deemed sufficient to establish that she had a separate domicile; and the gist of the decision in the latter case is that a marriage between a Moslem and an Englishwoman celebrated before the Registrar in England is a Christian marriage, and divorce from such a marriage can only be obtained on the principles applied to Christian marriages. This case, moreover, in so far as it laid down that notwithstanding the principle that the wife acquires the domicile of her husband the English Courts will not recognise any divorce which would not be valid in England although the personal law of the husband might permit such a divorce, is an authority for the proposition adverted to above that in exceptional circumstances the wife should be held to have a domicile of her own.

It is not suggested, and indeed it cannot possibly be suggested that the procedure adopted, or the decision arrived at, in the present case has resulted in any injustice. Incidentally, Dr. Sen Gupta by his sarcastic remarks that Mahomedan Law "seems just at the present time to be in great demand for dissolution of Hindu marriages" has unwittingly acknowledged the liberality and comprehensiveness of Islamic Jurisprudence which alone provides for a solution of the problem like the present.

Dr. Sen Gupta referring to a passage in Tyebji p. 249 contends that the present application was made under a rule of Muslim Public Law and proceeds on the assumption that Islam is the State Religion. With all respect to my learned friend I am constrained to say that he is labouring under a misapprehension on this point. There is no such thing as Public Law or Private Law in Islamic Jurisprudence. The sources of Mahomedan Law are well-known and that law wherever and to whatever extent it applies, applies equally to all. In India some portion has been abrogated and some saved by legislative enactments. What has been abrogated may be ignored, but what has been saved must be enforced whether it is administered by a Muslim, Christian or Hindu Judge. Islamic Jurisprudence provides for two sets of conditions, viz. Darul Islam (territories of peace) or Islamic country, and Darul Harb (territories of war) or non-Islamic country. The Calcutta High Court has held that India is not a non-Islamic country [*In re Ramkumari* (1)] It follows.

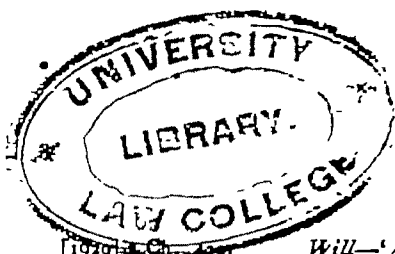
(1) (1891) I. L. R. 18 Calc. 264.

therefore, that all the rules of Mahomedan Law applicable to Darul Islam, barring of course those abrogated by Legislative enactments, must be enforced. It need not therefore, as Dr. Sen Gupta observes, "create an intriguing situation if a Christian Judge", when he is called upon to administer Mahomedan Law, has to conform to certain rules of that law, for a Judge when administering law is impersonal and has no religion.

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[ Further discussion on this topic will not be published in this Journal—Editors.]



[1929] 1 Ch. 400.

1929.

*In re Gates.*  
Gates  
v.  
Cabell.

#### NOTES OF CASES.

*Will—'All my money,' meaning of—Absence of context.*

A will consisted of the following words "I leave *all my money* to Alfred George Cabell." Question arose whether the word 'money' was used in the will in a popular and colloquial sense and included the whole of the personal estate of the deceased. Besides the expression above quoted there was nothing in the will to show that the testator intended to use it in the wider sense contended for. The matter first came up before *Clauson J.* who held that the expression "all my money" included the whole estate, including stocks and shares, excepting only real estate, and personal chattels including furniture and jewellery.

Against this decision an appeal was preferred and it was contended that the word 'money' in the present case should be limited to the liquid cash and in the absence of any context the word 'money' should be construed in its strict sense.

Held (*per Lord Hanworth M.R., Lawrence L.J. and Russell L.J.*) that in the absence of any context which enables the Court to give a more extended meaning the word 'money' included only the liquid assets of the testator's estate.

*In re Taylor* (1) followed.

(1) [1923] 1 Ch. 99.

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